Schedule 2-111 Judge Davis

Mark

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 174.

JILSON P. HARRISON, PLAINTIFF IN ERROR,

vs.

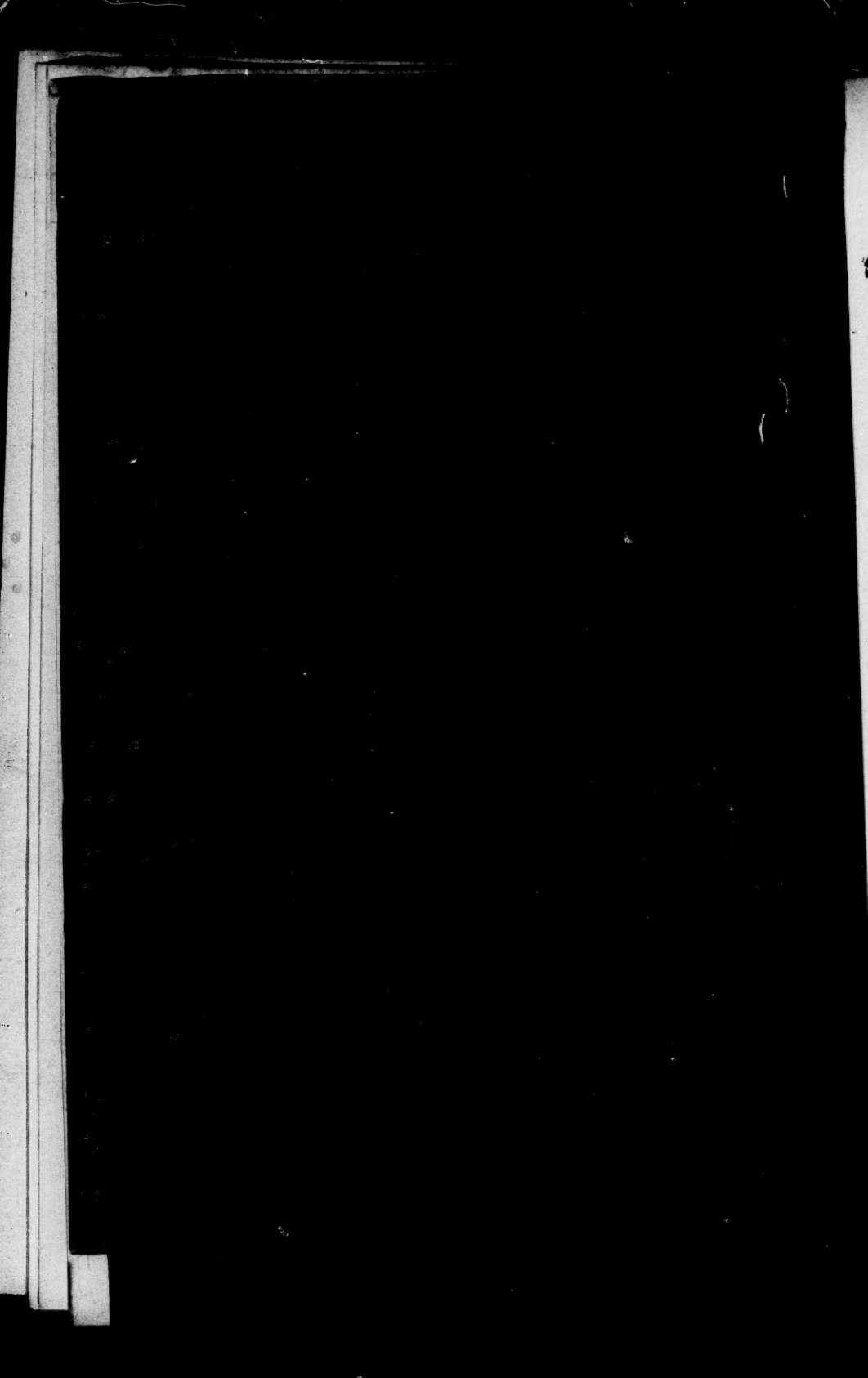
ESTHER B. MEYER, WIDOW AND TESTAMENTARY EXECUTRIX OF M. M. MILLER, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

FILED MAY 9, 1874.

Affirmed

Jus. Davis



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a 2139. Supreme court of La.

Filed March 1st, 1869.
(Signed) M. P. JULIAN,
Depy. Clerk.

STATE OF LOUISIANA,
Second District Court of New Orleans:

APPEAL IN THE SUIT OF JILSON P. HARRISON
vs.
ESTHER BARBARA MEYER, WIDOW AND TESTAMENTARY executrix of M. M. Miller, deceased.

D. C. Labatt and J. O. Harrison, esq., for appellant; Roselius & Philips, attys. for appellee.

1 STATE OF LOUISIANA,
Second District Court of New Orleans:

JILSON P. HARRISON
vs.
MRS. ESTHER BARBARA MEYER, WIDOW IN community and testamentary ex'x of M. M. Miller. No. 32544.

Petition.—Filed November 16, 1868.

To the honorable L. A. Duvigneaud, judge of the second district court of New Orleans:

The petition of Jilson P. Harrison, residing in New Orleans, respectfully sheweth:

That Mrs. Esther Barbara Meyer, widow in community and testamentary executrix of the last will and testament of M. M. Miller, deceased, whose succession has been duly opened in this honorable court, No. 32395 of its docket, is justly indebted to him, in her said capacity,
2 in the sum of eight thousand one hundred and three $\frac{25}{100}$ dollars, ($8,103.25,) with interest thereon at 5 % per annum from the 1st October, 1868, until paid, as per account hereto annexed and made part of this petition, to wit: That heretofore, to wit, on the 30th day of June, 1859, your petnr. and the said M. M. Miller, since deceased, entered into a written agreement of that date by which your petitioner leased to the said Miller, for and during the term of five years from the 1st Oct., 1859, the second and third stories of the brick tenements situated on Gravier street, between St. Charles and Carondelet, opposite the St. Charles Hotel, and known as two of the Touro buildings, &c., in consideration of which the said M. M. Miller thereby agreed and bound himself to pay to your petitioner the annual rent of two thousand dollars ($2,000.00) in monthly installments of $166.66 each, payable at the end of each and every month during the said term of five
3 years, all of which will appear by said written agreement now also filed herewith and made part of this petition.

Petitioner charges that the said M. M. Miller took possession of said leased premises on the first day of October, 1859, under and by virtue of said agreement and as tenant of your petitioner, and, as such tenant, continued in the occupancy thereof until the 8th day of August, 1865, and at the said rate of $2,000.00 a year, and admits that said Miller paid the said rent at the said rate up to the 1st May, 1862, but charges

that no part of said rent has been paid since the said first day of May, 1862, and that the rent of said premises from the 1st day of May is due to your petitioner, with interest, as stated in said account, and is wholly unpaid.

Petitioner further charges that on the day of Nov., 1865, he brought suit against said M. M. Miller on the said agreement in the 6th dist. court of New Orleans, for the purpose of recovering a judg-
4 ment against him thereon for the amount due by him to your petitioner as aforesaid, and caused the usual citation in such cases to be issued and served on him, and thereupon the said Miller appeared, by his attorney, in the case, and pleaded, among other things, that the prosecution of said suit was in violation of a military order or orders, then in force in the Department of the Gulf, of the which the State of Louisiana was then a part, and because thereof said Miller prayed that said suit be dismissed, and thereupon it was dismissed accordingly.

Petitioner says there was a military order or orders in force in the State of Louisiana prohibiting the prosecution of said suit as set forth in said plea, and as defendant claimed the protection of said military order against the further prosecution of said suit, your petitioner was compelled to dismiss the same, and was unable, in consequence thereof, further to proceed or act in relation to his rights against said Miller; and petitioner charges that the courts of the
5 parish of Orleans, within which the said Miller resided, were closed and ousted of jurisdiction by military order against the prosecution by suit therein of his rights to said rents while and so long as the State of Louisiana was under military government and control, and he charges, however, that his right to sue for and collect said rent was merely suspended during the existence of said military government and control, and were neither annulled, cancelled, or avoided nor discharged by said military order or orders, and that now his right to sue for and collect the same is under the law of the land perfect and complete.

Petitioner avers amicable demand, and that he has presented said claim for recognition to the executrix, who declines to acknowledge it.

Wherefore petitioner prays that said Mrs. Esther Barbara Mayer, widow in community and testamentary executrix of the last will and testament of said M. M. Miller, in her said capacities be cited to
6 appear and answer, and after due proceedings had she be condemned as such to pay your petitioner the sum of $8,103.25, with 5 % int. from 1st. Oct., 1868, until paid, and for costs and for general relief to be paid in due course of administration, and to be placed on the final tableau of said succession, and petnr. prays for all further orders, &c., &c.

(Signed) D. C. LABATT AND J. O. HARRISON,
For Plff.

Citation served on Mrs. M. M. Miller, executrix, &c.

JILSON P. HARRISON
vs.
ESTHER BARBARA MILLER, EXECUTRIX, &C. } No. 32244.

STATE OF LOUISIANA,
Second District Court of N. O.:

Mrs. Esther Barbara Mayer, widow in community and as testamentary executrix of M. M. Miller, deceased:

You are hereby summoned to comply with the demand contained in

the petition, of which a copy accompanies this citation, or deliver your answer to the same in the office of the clerk of the second district court of the parish of Orleans in ten days after the service
7 hereof.

Witness the honorable L. A. Duvigneaud, judge of said court the third day of December, 1868.

(Sgned) M. O. TRACY, *Clerk.*

Sheriff's return on foregoing citation.

Received Decr. 3rd, 1868, and on the 7th day of December, 1863, served copy of the within citation and accompanying petition on Esther Barbara Mayer in person. Returned same day.

(Signed)

S. ROUSSEAU,
Deputy Sheriff.

For documents annexed to petition see page 11 & .

Answer.—Filed Decr. 15th, 1868.

J. P. HARRISON
vs.
ESTHER BARBARA MILLER, EXECUTRIX, &C., &C. } No. 32544.

The defendant now comes into court, by *his* attorneys, and for answer to the plaintiff's petition, says that she denies all and singular the allegations therein contained, so far as they have any tendency to
8 give said plaintiff any right or cause of action against her; and for further answer this respondent says that the plaintiff, having left the city of New Orleans, and abandoned his property in the early part of May, 1862, and gone in the so-called confederacy, the premises were taken possession of by the United States authorities, and her husband was ejected, as the tenant of said plaintiff, from the premises, and was compelled to pay rent to the Government of the United States, through its proper officers, during the whole period for which the rent of said premises has not been punctually paid to the plaintiff; all of which, together with other necessary particulars, will more fully appear by reference to the annexed receipts and leases made part of this petition; and, for further defence, your respondent pleads the prescription of three years in bar to plaintiff's action.

Wherefore she prays to be hence dismissed with costs, and she prays for general relief; and, as in duty bound.

(Signed) C. ROSELIUS & ALFRED PHILIPS, *Attys.*

9 ACCOUNT, ANNEXED TO PETITION.—FILED NOV. 16, 1868.

Mr. M. M. Miller to J. P. Harrison, Dr.

To lease of 2nd & 3d stories of brick house on Gravier street, bet. St. Charles & Carondelet, New Orleans, as per articles of lease dated 30 June, 1859, from 1st May, 1862, to 1st Jan'y, 1863, 8 months, @ 166.66	1,333	28
Interest on each mont'ly payment would make an average of 3½ mos. to 1st Jan'y, '63, 5%, is	18	32
Am't due 1st January, 1863	1,352	10

Int. on $1,333.28 from 1st Jan'y, 1863, to 1st Oct., 1863, 5 yrs. & 9 mos., 5%.....	383 30	1,735 40
Lease from 1st Jan'y, 1863, to 1st Jan'y, 1864, 12 mos.....	2,000 00	
Average due 1st Jan'y, 1863, int. from 1st July, '63, to 1st Oct., '68, 5 yrs. & 3 months, 5 %....	525 00	2,525 00
Lease from 1st Jan'y, 1864, to 1st Jan'y, 1865, 12 mos.....	2,000 00	
Average 1st July, 1864, int. from 1st July, 1864, to 1st Oct., 1864, 4 years & 3 mos., 5 %.....	425 00	2,425 00
Lease from 1st Jan'y, 1865, to 8th Aug't, 1865, 7 mos. & 8 days.....	1,211 00	
10 Average due 1st May, 1865, 3 yrs. & 5 mos., int. to 1st Oct., '68, 5 %.....	206 85	1,417 85
Am't due 1st Oct, 1868.....		$8,103 25

DOCUMENTS, ANNEXED TO ANSWER, NUMBERED 1 TO 25.

No. 1.—*Lease for houses & tenements only.*

Memorandum of an agreement, made this first day of November, 1864, between Benj. F. Flanders, sup. special agent of the Treasury Department, duly appointed under the acts of Congress respectively approved March 12th, 1863, and July 2d, 1864, for taking charge of captured and abandoned property and leasing abandoned and confiscable lands, houses, and tenements in the third agency, and L. Olrich, of New Orleans, in the parish of Orleans, and State of Louisiana—

Witnesseth that, in pursuance of said acts, and of the instructions of the Secretary of the Treasury, the said agent, for and in behalf
11 of the United States, agrees, upon the terms hereinafter contained, to lease to the said Olrich, from the first of November, 1864, from month to month, either party being at liberty to terminate this lease at the end of any month from the date hereof, the following-described premises: the two stories of house No. 105 Gravier street.

And the said L. Olrich hereby agrees to pay the said agent seventy-five $\frac{00}{100}$ dollars per month, for each month from the date hereof, so long as he shall continue in possession of said premises, and to pay the rent for each month in advance, and at the expiration of this lease, as aforesaid, to deliver possession of the said property to the said agent, or his successor, in as good a condition as the same is now in, loss by fire and other unavoidable injury excepted.

By order:

BENJ. F. FLANDERS,
Sup. Spec. Agt. Treas. Dep't.

(Signed) OTTO MEINE,
Asst. L. S. Agt.

" LUCAS OLRICH.

12 Signed, sealed, & delivered in presence of—
R. JOHNSON & O. W. DANIEL.

Received, New Orleans, 5 Nov., 1864, of L. Olrich, seventy-five dollars, for rent for the month ending November, 1864.

(Signed) M. L. RAYBURN,
Treasurer.

$75.00.]

Received, New Orleans, Decr. 1, 1864, of L. Olrich, seventy-five dollars, for rent of , for the month ending Dec. 31st, 1864.
(Signed) M. L. RAYBURN,
$75.00.] *Treasurer.*

Received, New Orleans, Jan'y 3, '65, of L. Olrich, seventy-five dollars, for rent for the month ending Jan'y 31st, 1865.
(Signed) M. L. RAYBURN,
$75.00.] *Treasurer.*

Received, New Orleans, Feb'y 1, '65, of L. Olrich, seventy-five dollars, for rent of , for the month ending Feb'y 28th, 1865.
(Signed) M. L. RAYBURN,
$75.00.] *Treasurer.*

13 Received, New Orleans, Mch. 1, '65, of L. Olrich, seventy-five dollars, for rent of , for the month ending March 31st, 1865.
(Signed) M. L. RAYBURN,
$75.00.] *Treasurer.*

Received, New Orleans, April 1st, 1865, of L. Olrich, seventy-five dollars, for rent of , for the month ending April 30th, 1865.
(Signed) M. L. RAYBURN,
$75.00.] *Treasurer.*

Received, New Orleans, May 1, 1865, of L. Olrich, seventy-five dollars, for rent of , for the month ending May 31st, 1865.
(Signed) M. L. RAYBURN,
$75.00.] *Treasurer.*

Received, New Orleans, June 1, '65, of L. Olrich, seventy-five dollars, for rent of , for the month ending June 30, 1865.
(Signed) M. L. RAYBURN,
$75.00.] *Treasurer.*

Received, New Orleans, July 1st, 1865, of L. Olrich, seventy-five dollars, for rent of , for the month ending July 31st, 1865.
(Signed) M. L. RAYBURN,
14 $75.00.] *Treasurer.*

Received, August 1st, 1865, of L. Olrich, seventy-five dollars, for rent of , for the month ending August 31st, 1865.
(Signed) M. L. RAYBURN,
$75.00.] *Treasurer.*

No. 2.

Memorandum of an agreement, made this first day of September, 1865, between Capt. W. B. Armstrong, assistant quartermaster, department Bureau of Refugees, Freedmen, and Abandoned Lands, for the State of Louisiana, duly appointed to this duty, by order of Maj. Genl. Canby, June 29, 1865, and order of chief quartermaster Department of the Gulf, July 12th, 1865, approved by Thos. W. Conway, asst. commissioner Bureau of Refugees, Freedmen, and Abandoned Lands, State of Louisiana, and M. M. Miller, of this city, in the parish of Orleans and State of Louisiana:

Witnesseth, that in pursuance of acts of Congress, orders of
15 the Treasury Department, and from Bureau of Refugees, Freed-

men, and Abandoned Lands, on this subject, the said Capt. W. B. Armstrong, assistant quartermaster, for and in behalf of the United States, agrees, upon the terms hereinafter contained, to lease to the said M. M. Miller, from the 1st day of September, 1865, from month to month, either party hereto being at liberty to terminate this lease at the expiration of any month from the date hereof, the following-described premises: The two upper stories of house No. 105 Gravier street, the billiard-saloon.

And the said M. M. Miller hereby agrees to pay the said assistant quartermaster one hundred dollars per month, for each month from the hereof, so long as he shall continue in possession of said premises, and to pay the rent of each month in advance; and at the expiration of this lease, as aforesaid, to deliver possession of the said property to the said asst. quartermaster, or his successor, in as good condition
16 and the same is now in, loss by fire or other unavoidable injury excepted.

(Signed) W. B. ARMSTRONG,
Capt., A. Q. M.

(Signed) M. M. MILLER.
Pr. *pr.* LUCAS OLRICH.

Signed, sealed, and delivered in presence of—
(Signed) C. BLACK.

Received, New Orleans, Sept. 9th, 1865, of M. M. Miller, one hundred dollars, for rent of billiard-room No. 105 Gravier , for the month ending September 30th, 1865.

(Signed) W. B. ARMSTRONG,
$100.] *Capt. and A. Q. M.*

Received, New Orleans, October 2d, 1865, of M. M. Miller, one hundred dollars, for rent of , October, for the month ending Oct. 31st, 1865.

(Signed) W. B. ARMSTRONG,
$100.00.] *Capt. & A. Q. M., Bureau of F.*

No. 3.

17 OFFICE CHIEF Q. MASTER, DEPARTMENT OF THE GULF,
New Orleans, March 2d, 1863.

Received of M. M. Miller, one hundred dollars for rent of house 105 Gravier st.
$75.00 S. No. 297 St. Charles.
$25.00 in compliance with Orders 82.

(Signed) JNO. W. McCLURE,
Capt., A. Q. M.

No. 4.

OFFICE CHIEF QUARTERMASTER, DEPARTMENT OF THE GULF,
New Orleans, April 1st, 1863.

Recd. of M. M. Miller one hundred dollars for rent of house No. 105 Gravier street, & No. 297 St. Charles street, for the month of March, in compliance with Order 82.

(Signed) JNO. McCLURE,
Capt., A. Q. M.

No. 5.

OFFICE CHIEF Q. M., DEPARTMENT OF THE GULF,
New Orleans, May 1st, 1863.

Received from Lucas Olrich, atty. for M. M. Miller, seven hun-
18 dred and twenty-five dollars, in full payment for the two notes now held by this department for back rent due by M. M. Miller for premises No. 105 Gravier st. & 297 St. Charles st., said notes being dated February 9th, 1863, payable sixty days after date, in compliance with Order 82.

(Signed) JNO. McCLURE,
Capt., A. Q. M.

No. 6.

NEW ORLEANS, LA., *Feby. 9th*, 1863.

I promise to pay to Capt. J. W. McClure, as rent of house-lofts No. 105 Gravier, to Febry. 1st, 1863, six hundred ($600.00) dollars.

(Signed) M. M. MILLER,
$600.00] Pr. *pr.* LUCAS OLRICH.

No. 7.

OFFICE CHIEF Q. M., DEPARTMENT OF THE GULF,
New Orleans, June 1st, 1863.

Rec'd from Mr. L. Olrich, atty. for M. M. Miller, seventy-five dol-
lars cash, and twenty-five dollars bill for repairs, for rent of
19 houses No. 105 Gravier street & No. 297 St. Charles street, for the month of June, 1863, in compliance with Order 82.

(Signed) JNO. W. McCLURE,
$100.00.] *Capt., A. Q. M.*

No. 8.

OFFICE CHIEF Q. M., DEPARTMENT OF THE GULF,
New Orleans, May 1st, 1863.

Received from L. Olrich, atty. for M. M. Miller, seventy-five dollars cash, and twenty-five dollars bill of repairs, in full for rent of lofts No. 105 Gravier street and 297 St. Charles street.

(Signed) JNO. W. McCLURE,
Capt., A. Q. M.

No. 9.

OFFICE CHIEF Q. M., DEPARTMENT OF THE GULF,
New Orleans, July 1st, 1863.

Received from Mr. L. Olrich one hundred dollars, for rent of houses No. 105 Gravier & 297 St. Charles street, for the month of June, 1863, in obedien' to Genl. Order No. 82.

(Signed) JNO. W. McCLURE,
$100.00.] *Capt., A. Q. M.*

20 No. 10.

OFFICE CHIEF Q. M., DEPARTMENT OF THE GULF,
New Orleans, August 1st, 1863.

Received from L. Olrich, agent of M. M. Miller, seventy-five dollars, for rent of rooms in No. 105 Gravier street, and twenty-five dollars for

rent of No. 297 St. Charles st., for month of July, in compliance with Order 82.

(Signed) JNO. W. McCLURE,
Capt., A. Q. M.

No. 11.

OFFICE CHIEF Q. M., DEPARTMENT OF THE GULF,
New Orleans, Augt. 31, 1863.

Received from L. Olrich, agent of M. M. Miller, seventy-five dollars, for rent of rooms No. 105 Gravier street, and twenty-five $\frac{0}{100}$ for rent of 297 St. Chas. st., for month of August, 1863, in compliance with Order No. 82.

(Signed) JNO. W. McCLURE,
Capt., A. Q. M.,
Pr. *p.* C. BLACK, SR.,
Q. M. Agt.

$100.00.]

No. 12.

21 OFFICE ASSISTANT SPECIAL AGENT,
TREASURER'S DEPART.,
SEIZED HOUSES & FURNITURE,
New Orleans, Oct. 1*st*, 1863.

No. 213.]

Received of Mr. L. Olrich seventy-five dollars, for rent of 2 upper stories of No. 105 Gravier st., for September.

(Signed) J. H. JONES,
Per O. MEINE.

No. 13.

OFFICE ASSISTANT SPECIAL AGENT,
TREASURER'S DEPARTMENT,
SEIZED HOUSES & FURNITURE,
New Orleans, Oct. 31*st*, 1863.

Received of Mr. L. Olrich seventy-five dollars, for rent of 2 upper stories, 105 Gravier street, for October, 1863.

(Signed) J. H. JONES,
Per O. MEINE.

No. 14.

OFFICE ASST. SPECIAL AGENT,
TREASURER'S DEPARTMENT,
SEIZED HOUSES & FURNITURE,
New Orleans, Dec. 1*st*, 1863.

Received of Mr. L. Olrich seventy-five dollars, for rent of 105 Gravier street, 2 upper stories, for Nov., 1863.

22 (Signed) J. H. JONES,
P'. O. MEINE.

No. 15.

OFFICE ASST. SPECIAL AGENT,
TREASURY DEPARTMENT,
SEIZED HOUSES & FURNITURE,
New Orleans, Dec. 31*st*, 1863.

Received of L. Olrich seventy-five dollars, for rent of No. 105 Gravier street, (2 upper stories,) for Decr., 1868.

(Signed) J. H. JONES,
Pr. O. MEINE.

No. 16.

OFFICE ASST. SPECIAL AGT.,
TREASURY DEPARTMENT,
SEIZED HOUSES & FURNITURE,
New Orleans, February 1, 1864.

Received of Mr. L. Olrich seventy-five dollars, for rent of No. 105 Gravier street, for 2 upper stories, for January, 1864.

(Signed) J. H. JONES,
Per O. MEINE.

No. 17.

OFFICE ASST. SPECIAL AGENT,
TREASURY DEPARTMENT,
SEIZED HOUSES & FURNITURE,
New Orleans, March 1, '64.

23 Received of Mr. L. Olrich seventy-five dollars, for rent of No. 105 Gravier street, (2 upper stories,) for February, 1864.

(Signed) J. H. JONES,
Per O. MEINE.

No. 18.

OFFICE ASST. SPECIAL AGT.,
TREASURY DEPARTMENT,
SEIZED HOUSES & FURNITURE,
New Orleans, April 1st, 1864.

Received of Mr. L. Olrich seventy-five $\frac{00}{100}$ dollars, for rent of No. 105 Gravier st. for March, 1864, (upper stories.)

(Signed) OTTO MEINE,
Acting Local Spl. Agt.

No. 19.

SUPERVISING SPECIAL AGENT, PROPERTY DIVISION,
New Orleans, May 2d, 1864.

Mr. L. Olrich to B. F. Flanders, supervising special agent, Dr.

To rent of 2 upper stories No. 105 Gravier street from April 1st, 1864, to April 30, 1864, at $75.00.

Received payt.,
(Signed) T. A. WOOLFLEY, *Cashier.*

24 No. 20.

SUPERVISING SPECIAL AGENT'S DEPARTMENT,
PROPERTY DIVISION,
New Orleans, June 1st, 1864.

Mr. L. Olrich to Benj. F. Flanders, supervising spl. agt., Dr.

To rent of upper stories No. 105 Gravier street from May 1st, 1864, to May 31, 1864, at $ p. mo., $75.00.

Received payment.
(Signed) W. L. RAYBURN,
Treasurer.

SUPERVISING SPECIAL AGENT'S DEPARTMENT,
PROPERTY DIVISION,
New Orleans, June 6th, 1864.

Mr. L. Olrich to Benj. F. Flanders, supervising special agt., Dr.

To rent of upper stories No. 105 Gravier street from June 1st, 1864, to June 30th, 1864, at $ per mth., $75.00.
Received payment.
(Signed) W. L. RAYBURN,
Treasurer.

No. 22.

SUPERVISING SPECIAL AGENT'S DEPARTMENT,
FIFTH AGENCY, PROPERTY DIVISION, SECOND SECTION.

Mr. L. Olrich to Benj. F. Flanders, supervising special agt., Dr.

25 To rent of upper stories No. 105 Gravier street, from 1st Augt., 1864, to 31st August, 1864, at $ per mo., $75.00.
Received payment.
(Signed) M. L. RAYBURN, *Treasurer.*

No. 23.

SUPERVISING SPECIAL AGENT'S DEPARTMENT,
5TH AGENCY, PROPERTY DIVISION, SECOND SECTION,
New Orleans, July 1st, 1864.

Mr. L. Olrich to Benj. F. Flanders, supervising spl. agt., Dr.

To rent of 2 upper stories No. 105 Gravier street, from 1st July, 1864, to 31st July, 1864, at $ p. mo., $75.00.
Received payment.
(Signed) W. L. RAYBURN,
Treasurer.

No. 24.

SUPERVISION SPECIAL AGENT'S DEPARTMENT,
5TH AGENCY, PROPERTY DIVISION, SECOND SECTION,
New Orleans, Sept. 1st, 1864.

Mr. L. Olrich to Benj. F. Flanders, supervising special agent, Dr.

To rent of 2 upper stories No. 105 Gravier street, from 1st Sept., 1864, to 30th Sept., 1864, at $ pr. mo., $75.00.
26 Received payment.
(Signed) W. L. RAYBURN,
Treasurer.

No. 25.

SUPERVISING SPECIAL AGENT'S DEPARTMENT,
FIFTH AGENCY, PROPERTY DIVISION, SECOND SECTION,
New Orleans, Oct. 1st, 1864.

To Benj. F. Flanders, super'g special agent, Dr.

Mr. L. Olrich:

To rent of upper stories No. 105 Gravier street, from Oct. 1st, 1864, to Oct. 31st, 1864, at $ per mo., $75.00.

Received payment.

(Signed) W. L. RAYBURN,
Treasurer.

Note of evidence.

JILSON P. HARRISON
vs.
MRS. MILLER, EXECUTRIX. } No. 32544.

Second district court of N. O.

Note of evidence & testimony taken on the trial of the above-entitled suit, Jan'y 13th, 1869.

27 Plaintiff reserves the right to use the record of Harrison vs. Miller, No. 17265 of the docket of the 6th district court of N. O.

Counsel for plaintiff offers in evidence military order filed & marked A; also lease marked C.

Counsel for deft. offers in evidence leases marked 1 & 2, and received inclosed therein, together with the receipts numbered from 3 to 25 inclusive.

F. T. MEYERS, sworn on behalf of deft., says in chief:

I know the premises in controversy here. Mr. Miller, the tenant of Mr. Harrison under the lease referred to, was ejected from the premises by the military officers of the United States. Mr. Harrison was not in the city at that time. His property was restored to him in the latter part of October, 1865. I had lost sight of him up to that time. On the 27th October, 1865, the settlement was made for the rent accrued during the time Mr. Miller occupied the premises, and before he was
28 ejected therefrom, as appears by the receipt now produced, and the same being in the following words & figures, to wit:

NEW ORLEANS, *Oct.* 27, 1865.

Received of M. M. Miller four hundred and fifty dollars in payment of rent due me to 1st May, 1862, for his billiard-saloon on Gravier street, opposite the St. Charles Hotel.

$450.00.

(Signed) J. P. HARRISON.

(Counsel for defendant offers in evidence the above receipt, and also all the receipts for rent from Oct. 1st, 1865, up to Nov. 1st, 1866, (copies to be furnished.) Also military order by which the premises were seized by military officers, (copy of which to be furnished.)

Mr. M'yers, on his cross-examination, says:

Mr. Miller, as I have stated before, was ejected from the premises referred to, but his effects remained therein. Mr. Miller was ejected by order from the United States marshall.

(Plaintiff requires a copy of that order to be filed herein.)

29 Mr. Miller was not present when the premises were seized by the United States marshall. He was represented by his agent, Mr. Olrich, who died since. I was present when the seizure was made. Mr. Miller and his effects remained in the house as before the seizure. It was at least 2 years before Mr. Miller, who was absent at that time, came back, that the United States marshall gave that notice to Mr. Orlich, his agent. The new lease referred to was executed by Mr. Olrich, the agent of Mr. Miller; we had to pay sometimes $100 and $75. Business in the house went on just as before the marshall gave the notice.

Counsel for defendant introduces in evidence the new lease referred to, (copy to be furnished.)

DOCUMENTS OFFERED IN EVIDENCE.

Military order marked A.—Filed in evidence by plaintiff Jan'y 13th, 1869.

HEADQUARTERS DEPARTMENT OF THE GULF,

30 *New Orleans, Mch. 2,* 1864.

[General Orders No. 31.]

All suits and other legal proceedings in the State courts of Louisiana against the lessees of property from the Government of the United States, real or personal, for possession, occupation, rent, or trespass, are hereby suspended until further orders. Any persons who may have claims against such lessees, or who are aggrieved by such occupation, will present their claims to the provost-marshall of the department.

By command Maj. Genl. Banks.

(Signed) RICHARD B. IRWIN,
Assistant Adju'nt Genl.

HEADQUARTERS DEPT. OF LOUISIANA,
New Orleans, La., Jany. 7, '69.

A true copy.

(Signed) NATHANIAL BURBANK,
Lieut. U. S. Army, Actg. Asst. Adjudt. Genl.

Lease, marked C, offered in evidence by plaintiff.—Filed Jany. 13, 1869.

31 This agreement, made and entered into at the city of New Orleans, on the 30th day of June, 1859, between J. P. Harrison and M. M. Miller, of said city, witnesseth, that said Harrison does, by these presents, lease or let unto the said Miller for and during the full space and term of five years, to begin on the 1st day of October, 1859, next ensuing the date hereof, and to cease and terminate on the 30th day of September, eighteen hundred and sixty-four, (1864,) the second and third stories of the brick tenements situated on Gravier street, between St. Charles & Carondelet streets, opposite the St. Charles Hotel, known as two of the Touro buildings, and now used as billiard-saloons by said Miller, and immediately over the coffee-house kept by Joseph Santini.

It being understood and agreed that said Harrison is to have the third stories of said houses raised six feet and well covered in and finished on or about the said first day of Oct., 1859, the beginning of
32 said lease.

In consideration whereof, the said Miller hereby agrees and binds himself to pay to the said Harrison, and to his assignees, executors, &c., the annual rent of $2,000.00, two thousand dollars, payable monthly, say one hundred and sixty-six $\frac{66}{100}$ dollars, (166\frac{66}{100}$) at the end of each and every month, any month of which not being paid punctually, the said ballance of this lease shall thereby become due and collectable on such failure to pay punctually. It is well understood that during the continuance of this lease all the small repairs shall be made at the expense of the lessee, as well as the cleaning of the privys. The premises being in good order, or to be in good order, at the beginning of this lease, the said lessee agrees to keep the same in like good order, and to comply with all the ordinances of the city, and to return the same, at the expiration of said lease, in like good condition, usual wear
33 and tear excepted, to put nothing therein which would forfeit the insurance, to make no alterations and no sublease of the premises, or use them for any other purpose than that intended, without the written consent of the lessor, who reserves to himself the right of annulling said lease in case the said lessee should fail to pay the rent stipulated, or otherwise violate the contract.

The said Miller having agreed to and accepted the foregoing lease with the conditions and stipulations, the said parties have hereto signed their names in duplicate the day and year above written.

(Signed) J. P. HARRISON.
" M. M. MILLER.

Witness:
(Signed) S. C. TOMLIN.

For leases marked 1 & 2 offered in evidence by deft., see pages 12 and 16.

For receipts marked 3 to 25 offered in evidence by deft., see pages 19 to 30.

34 For receipt offered in evidence by deft., see page 32.

For receipts dated from Oct. 1st, 1865, up to Nov. 1st, 1866, see p

Military order seizing premises.—Offered by defendant and filed January 13 h, 1869.

NEW ORLEANS, *Mch.* 23, '63.

UNITED STATES *vs.* HARRISON. } No. 15.

U. S. OF AMERICA,
Marshall's Office:

In the United States provisional court in and for the State of Louisiana.

To M. M. MILLER, (through Lucas Olrich:

Please to take notice that by virtue of a writ of confiscation issued in the above-mentioned suit, I have seized and taken into my possession

square No. 223, buildings thereon, all furniture, movable property, &c., belonging to the above. Rents due or to become due you will pay to the U. S. marshall.

(Signed) H. T. BLODGET,
35 *Asst. Depty. U. S. Marshall.*

HEADQUARTERS OFFICE CHIEF QUARTERMASTER,
March 26, 1863.

The house in question has been rented to Mr. Miller, and he has paid the rent to me every month, and will continue to do so.

(Signed) JNO. W. McCLURE,
C. A. Q. M.

Document.—Filed Jany. 13, 1869.

OFFICE CHIEF Q. M. DEPARTMENT OF THE GULF,
New Orleans, Jany. 31, 1863.

Mr. M. M. MILLER:

You are hereby notified not to pay rent for the premises occupied by you, No. 297 St. Charles & 105 Gravier street, except to me.

(Signed) CAPT. J. W. McCLURE,
A. D. Cn. A. Q. M.

Military orders.—Filed January 13, 1869.

[General Orders No. 82.]

HEADQUARTERS DEPARTMENT OF THE GULF,

36 NEW ORLEANS, *Oct.* 17, 1862.

All persons holding powers of attorney or letters of authorization from, or who are merely acting for, or tenants of, or intrusted with any moneys, goods, wares, property, or merchandise, real, personal, or mixed, of any person now in the service of the so-called Confederate States, or any person not known by such agent, tenant, or trustee to be a loyal citizen of the United States, or a bona-fide neutral subject of a foreign government, will retain in their own hand until further orders, all such goods, ware', merchandise, and property, and make an accurate return of the same to David C. G. Field, esq., the financial clerk of the department, upon oath or on before the first day of November next. Every such agent, tenant, or trustee failing to make true return, or shall pay over or deliver any such moneys, goods, merchandise, and property to or for the use, directly or indirectly, of any person not known by him to be a loyal citizen of the United States,
37 without an order from these headquarters, will be held personally responsible for the amount so neglected to be returned, paid over, or deliver'; all rents due or to become due by tenants of property belonging to persons not known to be a loyal citizen of the United States will be paid as they become due to D. C. G. Field, esq., financial clerk of the department.

By command of Major-Genl. Butler:

(Signed) GEO. C. STRONG,
Asst. Adjt. Genl., Chief of Staff.

Official:

(Signed)

NATHANIEL BURBANK,
1st Lt. & A. A. A. Q.

Military order.—Filed in evidence January 13th, 1869.

[Genl. Orders No. 110.]

HEADQUARTERS DEPARTMENT OF THE GULF,
New Orleans, Dec. 17, '69.

1. All the telegraph lines in this department are placed under the protection of the Government.

By orders from the War Department, Chas. S. Buckley will
38 have control of all telegraph lines, and will take charge of all telegraph offices and materials in this department.

Commanding officers will afford the necessary aid for the protection and repair of the lines.

All houses in New Orleans which have been taken possession of for the Government will be immediately turned over to such officer of the quartermaster's as Col. S. B. Holabird, chief quartermaster, may designate, and such houses will not be occupied hereafter except by his assignment, in no case to exceed the regulation-allowance of quarters.

By command of Maj. Genl. Banks:

(Signed) RICHARD B. IRWIN,
Lieut. Col., A. A. Genl.

Official:

(Signed) NATHANIEL BURBANK,
1st Lieut., A. A. A. A. Q.

Military order.—Filed in evidence Jany. 14, '69.

[Genl. Orders No. 117.]

HEADQUARTERS DEPART. OF THE GULF,
New Orleans, Dec. 24, 1862.

39 I. Owing to the necessities of the service, and to preserve the reputation of the Army, all horses, mules, wagons, carriages, and other means of transportation, in the possession of officers, soldiers, or employees of the Government in this city and throughout the department will be delivered to the chief quartermaster, or such officers of this department as he may designate. Horses, wagons, &c., which have been purchased in the State of Louisiana, by such parties, must be reported and registered at the office of the chief quartermaster. A certified copy of the bill of sale, giving the date, place of purchase, from whom bought and amount paid, with a description of the property, will be deposited at the same time. Officers entitled to horses, and having them in possession, as above stated, may have them appraised and paid for by getting proper authority so to do.

All commanding officers, provost-marshalls, quartermasters, and other military agents of the Government are directed to enforce this
40 order. Every violation for evasion of it will be reported to the chief quartermaster.

II. The chief quartermaster will cause all seized or confiscated houses not assigned by his authority to be vacated without delay; regimental officers will be provided with quarters near their regiments.

III. All general and staff officers regularly assigned to duty in this city will be paid commutation of quarters and fuel, provided fuel is not issued in kind, and that no such officer occupy a seized or confiscated house, or other building rented for the Government.

IV. All houses irregularly seized, occupied, or confiscated will be disposed of by the chief quartermaster, who will, as far as practicable, deliver them to responsible persons, to be held by them subject to the future disposition of the Government. The provost-marshall will give any assistance necessary to carry out this order.

By command of Maj. General Banks:

41 (Signed) RICHARD B. IRWIN,
Lieut. Col., Asst. Adjt. Genl.

Official:
(Signed) NATHANIEL BURBANK,
1st Lieut., A. A. A. A. Q.

New lease of 1865.—*Filed in evidence Jany.* 13, '69.

This agreement, made & entered into, at the city of New Orleans, on the 27th day of October, 1865, between J. P. Harrison and M. M. Miller, of said city, witnesseth that the said Harrison does by these presents lease or let unto the said Miller for and during the full space and term of one year, to begin on the first day of November, 1865, next ensuing the date hereof, and to cease and terminate on the 31st day of October, eighteen hundred and sixty-six, (1866,) the second and third stories of the brick tenement situated on Gravier street between St. Charles and Carondelet streets, opposite the St. Charles Hotel & known as two of the Touro buildings, & now used as billiard-saloons by said Miller & immediately over the coffee-house kept by Joseph
42 Santini.

In consideration whereof the said Miller hereby agrees and binds himself to pay to the said Harrison and to his assignees, executors, &c., the annual rent of $2,000.00, two thousand dollars, payable monthly, say one hundred and sixty-six $\frac{66}{100}$ dollars ($166.$\frac{66}{100}$) at the end of each and every month, any month of which not being paid punctually, the balance of the lease shall thereby become due and collectable, on such failure to pay punctually. It is well understood that during the continuance of this lease all the small repairs, the cleaning of the privys. The premises being in good order at the beginning of this lease, the said lessee agrees to keep the same in like good order, to comply with all the ordinances of the city, and to return the same at the expiration of said lease, in like good condition, usual wear and tear excepted; to put nothing therein which would forfeit the insurance, to make no alterations and no sublease of the premises, or use them
43 for any other purpose than that intended, without the written consent of the lessor, who reserves to himself the right of annulling the lease in case the said lessee should fail to pay the rent stipulated, or otherwise violate the contract.

It is further agreed and understood that the above lease for one year shall in nowise prejudice the claim which said Harrison has against said Miller for back rents due and unpaid in virtue of a former lease under which said Miller used and occupied said premises, and for which unpaid back rents suit is now being instituted in the sixth district court of New Orleans, by said Harrison against said Miller.

The said Miller having agreed to and accepted the foregoing lease, with the conditions and stipulations, the said parties have hereto signed their names in duplicate the day and year first above written.

(Signed) J. P. HARRISON.
" M. M. MILLER.

44 *Military order.—Filed in evidence January 14th, 1869.*

[General Orders No. 38.]

HEADQUARTERS DEPARTMENT OF THE GULF,
New Orleans, La., September 8th, 1865.

The commanding general understands that persons whose property has been seized as confiscable, or abandonned, and who have had it restored through the clemency of the Government, have threatened *to* the tenants and lessees of the Treasury Department with vexatious suits to recover rents for the terms for which it had been held by such tenants or lessees, and have endeavored to harass or coerce them into compromising these unfounded and unlawful demands.

The tenants of the Government are warned that the rents for the terms during which the' held under lease or demise from the Treasury or other Departments are due to the Government alone, and no plea or excuse of a payment to a third party will be accepted or entertained, but the lawful rights of the General Government will be rigidly enforced, and
45 its tenants protected.

By order Maj. Genl. E. R. S. Canby.

WICKHAM HOFFMAN,
Assistant Adjt. Genl.

Official:
(Signed) NATHANIEL BURBANK,
1st Lt. & A. A. A. Q.

Order: Case taken under advisement.—Minutes of January 13, '69.

J. P. HARRISON
vs.
MILLER'S EXECUTRIX, &C. } No. 32544.

This case came up to-day regularly for trial.
Present: D. C. Labatt & J. O. Harrison for plff.
" Roselius & Philips " def't; when, after hearing pleadings, evidence, and argument of counsel, the court took the same under advisement.

Bill of exceptions No. 1.—Filed January 14, 1869.

J. P. HARRISON
vs.
ESTHER BARBARA MEYER, WIDOW & EXECUtrix, &c., &c. } No. 32544,

Be it remembered that on the trial of this suit the defendant,
46 by her attorney, introduced Myer as a witness, and offered to prove by him the agreement marked No. 1, purporting to be an agreement of lease between Benjamin F. Flanders, special agent of the Treasury Department, &c., and Lucas Orlich, bearing date the first day of October, in the year 1864, to which testimony the plaintiff, by his attorney, then and there objected as incompetent and irrelevant: 1st. Because there was no proof shewing that said M. M. Miller, the testator, had been evicted from the premises leased to him by the plaintiff; 2d. Because there was no proof that said Miller had been evicted therefrom

by process of law; 3d. That said Miller had entered into possession of said premises as tenant of plaintiff, and that the relation between them as landlord and tenant had not expired, nor had it been annulled by consent or by process of law, & while said relation was subsisting the said Miller had no legal right under the state of fact to change the character of his possession by agreeing to hold the prem-
47 ises, under a third party, and that any such agreement with a third party was null and void as to the plff.; 4th. Because there was no order of the Government for eviction of said Miller from said premises; 5th. Because said Miller, if evicted therefrom, was evicted without authority of law therefrom, for which they who had evicted him were alone responsible to him; which objections being heard by the court were overruled, and thereupon the said Meyer proved the execution of said agreement, and the defendant, by her attorney, then offered the said agreement in evidence, to which the plff., by his atty., also then and there objected as incompetent and irrelevant for the same reasons above set forth, which objections being heard, were then and there also overruled by the court, and thereupon the defendant was permitted by the court to read said agreement as evidence in their behalf. To which several rulings and decisions of the court, and to each of them, the said plff. then and there executed and prayed that this his bill of exceptions be signed
48 by the judge and made part of the record.

(Signed) LS. DUVIGNEAUD, *Judge.*

Bill of exceptions No. 2.—Filed January 14, 1869.

J. P. HARRISON
vs.
MRS. ESTHER BARBARA MAYER, TEST'Y EXECUTRIX, &c. } No. 32544.

Be it remembered that on the trial of this suit, the deft., by her atty., offered to prove by Mayer, the execution of agreement marked No. 2, purporting to be an agreement of lease between Captain W. B. Armstrong, assistant quartermaster, &c., &c., and M. M. Miller, bearing date the first day of September, (copy it,) to which testimony, the plaintiff, by his atty., then and there objected as being incompetent and irrelevant, and urged by him in support of his said objections the same grounds and reasons urged by him to the testimony of the same witness as is set forth in bill of exceptions No. 1, which objections being heard were overruled by the court, and thereupon said deft., by her atty.,
49 offered to read said agreement No. 2 in evidence, to the reading of which in evidence the plaintiff, by his atty., also then and there objected as being incompetent and irrelevant, and urged in support of his said objections the same grounds and reasons as set forth in bill of exceptions No. 1, which objections being heard were overruled by the court, and thereupon the said agreement was, by permission of the court, read in evidence on behalf of deft. To which several rulings and decisions of the court, and to each of them, the plaintiff, by his atty., then and there excepted and now presents this his bill of exceptions, and prays that it may be signed and made part of the record.

(Signed) LS. DUVIGNEAUD, *Judge.*

Bill of exceptions No. 3.—Filed January 14, 1869.

J. P. HARRISON
vs.
ESTHER BARBARA MAYER, widow and test'y executrix, &c. } No. 32544.

Be it remembered that on the trial of this suit the defendant,
50 by her atty., offered to prove by the witness Myer the execution of divers receipts shewing payments by said M. M. Miller, or by his agent, under and by virtue of the seizure spoken of by the said witness.

The receipts now referred to being all the receipts filed by deft. in this suit and permitted by the court to be read in evidence on the trial, except those signed and executed by J. P. Harrison, the said receipts so read in proof being numbered from 3 to 25 consecutively.

And thereupon the plaintiff, by his atty., objected to the testimony of said witness, in so far as he was offered to prove the execution of said receipts and the payment of the money as therein specified, as being incompetent and irrelevant, said objection having been made to each of said receipts as they were respectively offered upon the following grounds: 1st. Because said payments, if made by said Miller, were voluntary and of his own wrong, without any authority from the plaintiff and in violation of his rights and without authority of
51 law.

2d. Because the said Miller would not, under the circumstances, lawfully hold possession of said premises for a third person, as his landlord, except by consent of the plff., and that any payment by *by* him to such third person as landlord was in violation of law and unauthorized.

3d. Because said Miller had never been evicted by process of law from said premises, and for the other grounds and reasons set forth in bill of exceptions No. 1, which objections being heard were overruled by the court, and each of said receipts was read by the court, plff.'s objections to each to the contrary notwithstanding.

To which several rulings and decisions of the court the plaintiff then and there excepted, and now presents this his bill of exceptions, and prays that it be signed and made part of the record in this case.

(Signed) LS. DUVIGNEAUD, *Judge.*

52 *Admissions.—Filed January* 16, '69.

J. P. HARRISON
vs.
ESTHER B. MAYER, testamentary executrix, &c. } No. 32544. 2d dt. court of N. O.

ADMISSIONS.

It is admitted that J. P. Harrison, plff. in this suit, brought suit in the sixth district court of New Orleans on the 8th November, 1865, against said M. M. Miller, since deceased, on the same agreement of lease now sued on by him in this suit, for the purpose of recovering a judgment thereon against said Miller for the same rents now alleged by plaff. to be due to him as set up in his present petition.

And the said Miller, after being duly cited in that suit, appeared by

his atty. and filed the following answer thereto, which answer is referred to for the sole purpose of shewing that the defendant Miller in that suit objected to said suits being brought and presented be-
53 cause it was in violation of the military order alluded to in the plaintiff's petition in this suit.

An official copy of said answer will be annexed and filed as part of the record in this suit for the purpose above said. Upon the said being filed in said suit, the same plaintiff discontinued it.

(Signed) C. ROSELIUS & ALF. PHILIPS,
Attys. Deft.

J. O. HARRISON,
Atty. Plff.

Answer annexed to admissions.—Filed Nov. 25, 1865.

J. P. HARRISON
vs. } No. 6th dist. court of New Orleans.
M. M. MILLER.

Now comes into court, by his undersigned attys., the defendant, M. M. Miller, and, reserving to himself the benefits of all legal exceptions to the plaintiff's petition, for answer thereto denies, all and singular, the allegations therein contained not hereinafter specially admitted.

And further answering, respondent admits that he entered into
54 the contract of lease described in and annexed to the plaintiff's petition, but he denies that he is indebted to the plaintiff for any rent under the said lease. Respdt. pleading the prescription of three years in bar of plaintiff's claim for rent alleged to have accrued prior to the 8th day of November, 1862, and specially averring that on the 17th October, 1862, the city of New Orleans being then in the possession and under the exclusive control of the United States, by which the same had been wrested from the rebel authorities, Major Genl. Butler, commanding the military district embracing the city of New Orleans, and known as the Department of the Gulf, issued and published an order, to wit, General Order No. 82, commanding tenants *do* retain in their own hands until further orders, all monies belonging to any persons not known by them to be loyal citizens of the United States, and proclaiming that in case of the payment of such monies to such persons without an
55 order from the headquarters of the department, or in case of the payment of such monies to such persons without an order from the headquarters of the department, or in case of the failure to make true returns of such monies or other property, tenants and others would be held personally responsible for the amounts so paid over or delivered or neglected to be returned, and directing further that all rents due or to become due by tenants of property belonging to persons not known to be loyal citizens of the United States should be paid over to D. C. G. Field, financial clerk of the department.

Respondent avers that after the issuance and publication of the said order, neither plff. nor any other *any other* of his called upon respondent for any rent, and on the 31st January, 1863, respdt. received a notification in writing from the chief quartermaster of the Department of the Gulf, Col. S. B. Holabird, through Captain J.
56 W. McClure, assistant quartermaster, not to pay any rent for the premises leased from plff. to any one except him, the said McClure. Respondent avers that said Holabird and McClure, in taking possession of and disposing of property belonging to persons not known

to be loyal, acted with the knowledge, approval, and authority of the major-general commanding, and in lieu of the aforesaid D. C. G. Field, and that on the 9th February, 1863, the said McClure in his aforesaid capacity, and by virtue of General Order No. 82, compelled respondent to give his obligation for six hundred dollars rent of the said premises due up to the 1st February, 1863, which obligation was duly paid; and moreover, on the 9th February, 1863, by virtue of the authority conferred upon him, and the possession which, under military orders, he held of the said premises, the said McClure consented to respondent's remaining in the occupancy thereof on his paying a monthly rent of seventy-five dollars therefor, to Col. S. B. Holabird, chief quar-
57 termaster, or to him the said McClure, assistant quartermaster.

That neither plaintiff nor any agent of his could be found, plff. having left the city and gone within the rebel lines, and virtually abandonned his property, so that respondent was unable to appeal to him for the protection which, a lessor, he was bound to secure to him in the occupancy of the premises, and was unable to notify him or any agents of his of the demands made by the military authorities, so that he might take such steps as he might have deemed proper to prevent their ousting him out of the enjoyments of his property; that the refusal of respondent to comply with the aforesaid demands of the military would have resulted in his summary ejection from the premises and the infliction upon him of penalties, and would have been of no avail.

That at the time of the taking possession of as aforesaid by the military authorities, and for a considerable period anterior and sub-
58 sequent thereto, there existed such a stagnation in business, so many of the city inhabitants had left it and abandonned their property, and such a general state of demoralization pursuaded the community, that nearly all the landlords in the city were content to let their tenants occupy the tenements leased them at the most reduced rents, far below those stipulated in their leases, and in many cases without requiring any rents, for fear that if their houses were vacated they would immediately be occupied by the soldiers of or by the negroes or taken possession of by the military authorities; that the plff., Harrison, could not be ignorant of these facts, nor of the taking possession of the rents due him and property belonging to him by the military authorities, yet he never made any opposition thereto.

Respondent avers that from the first February, 1863, to the 1st September, 1863, he held possession of the premises under a special
59 lease from the military authorities as aforesaid, to whom he regularly paid rent therefor; that from the 1st Sep., 1863, to the 1st September, 1865, he paid rent therefor to the supervising general agent of the United States Treasury Department, and thereafter, to wit, from the 1st September, 1865, to 1st November, 1865, to Captain W. B. Armstrong, asst. quartermaster, Bureau of Refugees, Freedmen and Abandonned Lands.

Respondent avers that all this was done not only without opposition of the part of plaintiff, but that it was not until very lately that the plaintiff, having sued for pardon and amnesty at the hands of the President of the United States, and obtained the same, his property was restored to him, and respondent avers and charges that the present action after the plff.' dispossession by the military and civil authorities of the Federal Government, and his utter neglect to assert and maintain his rights, if any he had or could maintain against the said authori-
60 ties, and his abandonment of his property without leaving an agent

to protect the defendant in the premises he had originally granted him, is not only unfounded in law and equity, but in violation of the very terms and conditions on which he obtained his pardon, and in direct contravention with the orders of the present commander of the Department of Louisiana.

Wherefore respondent prays that judgment be rendered in his favor on the plaintiff's demand, and for costs, and for all other relief, and as in duty bound.

(Signed) C. E. SCHMIDT, *Atty.*

A true copy:

JOHN H. SHEUY, *Dy. Clerk.*

Reasons for judgment.—Filed Jan. 20, 1869.

J. P. HARRISON
vs.
SUCC'N M. M. MILLER. } No. 32544.

Plaintiff entered into a contract of lease between the deceased, Mr. Miller, on the 30th day of June, 1859, for the second and third
61 stories of the brick tenement situated on Gravier street for the space of five years from the first October, 1859, at the rate of $2,000 per annum, payable monthly. Plaintiff alleges in his petition that the rent has been punctually paid from the date aforesaid up to the 1st May, 1862, and claims now the rent alleged to be due from May, 1862, up to the 1st October, 1868, with interest, forming an amount of $8,103.21c.

In answer, the administratrix of the succession filed a general denial and pleads specially that the plaintiff having left the city and abandoned his property in the early part of May, 1862, and gone into the so-called confederacy, the premises were taken possession of by the United States authorities, and her husband was ejected as the tenant of the plaintiff from the premises, and was compelled to pay rent to the Government of the United States, through its proper officers, during the whole period for which the rent of the said premises has not been punc-
62 tually paid to the plff. Deft. further pleads the prescription of three years in bar of plff.'s action.

All the facts alleged in defendant's answer have been fully proved.

Article 2662, paragraph 3, of the civil code of Louisiana, which is lit*erell*aly taken from Art. 1722 of the Code Napoleon, says that the lessor is bound to cause the lessee to be in peaceable possession of the thing during the continuance of the lease.

Fortuitous events, named also *in* major, on account of the irresistible action that they experience on human weakness, proceed from two great causes, says Troplong, first by nature, secondly by the acts of man.

We will confine ourselves to the second of these two causes, because it forms the object of the defense.

The fortuitous events from the acts of man, says Troplong, (Contint de louage, V. 2, p. 22, No. 208,) are, the war, the inroad of pirates, the assault of thieves, the act of the prince or the sovereign, and vio-
63 lence exercised by an overwhelming power.

The lessees in this case has been disturbed by the United authorities, who have ejected him from the premises; but, says the plaintiff, the lessee has continued his possession of the premises. But says the plaintiff, has continued his possession of the premises by consent of the United States authorities, and he is liable to for the rent to him, al-

though he has paid the same to the United States. The reasons and grounds alleged by the plaintiff are untenable.

Let us examine whether the lessor or the lessee have any fault in the occur'ence of these events. As soon as the Federal Army has taken possession of this city, the plaintiff has left and abandonned property in the hands of the lessee, who has quietly remained here and continued to occupy the premises. Had the plff. done the same, the Federal authority would not have taken possession of the premises as abandonned property, and everything would have gone smoothly.

64 What has happened was certainly not by the fault of the lessee, and why should he suffer for the same? Could the defendant have prevented that state of things by any exertions of his? Certainly not. Suppose he had left the premises when ordered so to do by the Federal authorities, can it be said that the plaintiff would have had a right at the restoration of peace to compel him to pay the rent for the premises when by his major the lease had been virtually rescinded and annulled by the very fault of the lessor, who by all means was bound to cause him to be put in peac'able possession of the thing leased? (Pothier, Control de louage, No. 148. Troplong, do., No. 225, & suivants. Sirey, Commentaires, art. 1722, Code Napoleon.)

The voluntary discontinuance of the suit brought by plff. against deft. in the 5th dist. court for the recovery of the rent, through which he has interrupted prescription, having ceased to have its effects, prescription of three years is now acquired.

65 It is therefore ordered, adjudged, and decreed that there be judgment for defendant with costs.

Judgment.

J. P. HARRISON
vs.
ESTHER BARBARA MEYER, WIDOW AND TEST'Y executrix of M. M. Miller, dec'd. } No. 32544.

For the reasons assigned in the written opinion of the court this day delivered and on file, it is ordered, adjudged, and decreed that there be judgment for defendants with costs.

Judgt. rendered Jany. 20, 1869.
Judgt. signed February 5, 1869.
(Signed) LS. DUVIGNEAUD, *Judge.*

Motion for a new trial.—January 22d, 1869.

JILSON P. HARRISON
vs.
ESTHER BARBARA MEYER, WIDOW & TEST'Y executrix of M. M. Miller, deceased. } No. 32544.

On motion of D. C. Labatt and J. O. Harrison, attys. for plff.

66 in this suit, it is ordered that the deft. shew cause on the 1st day of February, 1869, at 11 o'clock a. m. of that day, why a new trial should not be granted herein on the following grounds:

1st. Because the judgment rendered herein against plaintiff is contrary to law and evidence.

2d. Because the court erred in overruling plaintiff' objections to the testimony of Meyer as set forth in the several bills of exceptions now on file herein.

Sheriff's return on motion.

Received January 23, 1869, and on the same day served copy of the within motion on the firm of Roselius and Philips, attys., by personal service on Alf. Philips, esq.
Returned same day.
(Signed) H. F. LYND,
Dy. Sheriff.

Rule dismissed.—Minutes, February 4, 1869.

JILSON P. HARRISON
vs.
ESTHER B. MILLER, EX'X, &C. } No. 32544.

67 The rule herein taken on the 22d January, 1869, came up to-day. Present, J. O. Harrison, for plff. in rule, Roselius & Philips, for deft. in rule.
In this case, the court having duly considered, and seeing no reason to change the judgment, it is ordered that the rule for new trial be dismissed, and the judg't sought to be set aside remain undisturbed.

Motion of appeal.—Filed February 5th, 1869.

JILSON P. HARRISON
vs.
MRS. ESTHER B. MEYER, WIDOW & TEST'Y executrix of M. M. Miller, deceased. } No. 32544.

On motion of J. O. Harrison and D. C. Labatt, of counsel for plaintiff, and on suggesting to the court that a final decision has been herein rendered by which he is irreparably ag'rieved and injured, and in which he is advised there is error to his prejudice, and from which he desires to appeal to the supreme court of Louisiana, be
68 granted to plaintiff upon his giving bond, with good and solvent security, conditioned as the law directs, in the sum of two hundred dollars, and that the appeal be returnable to said S. C. on the 2d Monday in March, 1869.

Bond of appeal.

STATE OF LOUISIANA:

Know all men by these presents that we, Jilson P. Harrison and James O. Harrison, both of New Orleans, are held and firmly bound unto the clerk of the second district court of New Orleans, his executors, administrators, and assigns, in the sum of two hundred dollars, for the payment whereof we bind ourselves, our heirs, executors, and administrators, firmly by these presents, sealed with our seals and dated in the city of New Orleans, on this 5th day of February, 1869.
Whereas the above-bounden J. P. Harrison this day filed a motion of appeal from a final judg't rendered against him in the suit of J. P. Harrison vs. The succession of M. M. Miller, deceased, in the second district court of New Orleans, on the day of :
69 Now, the condition of the above obligation is such that the above-bound J. P. Harrison shall prosecute his appeal and shall satisfy whatever judgment may be rendered against him, or the same

shall be satisfied by the proceeds of the sale of his real estate, real or personal, if he be cast in the appeal; otherwise the said J. O. Harrison, surety, shall be liable in his place.

(Signed) J. P. HARRISON.
" J. O. HARRISON.

Signed, sealed, and delivered in the presence of—
(Signed) D. C. LABATT.

STATE OF LOUISIANA,
Second District Court of New Orleans:

I hereby certify that the foregoing 83 pages do contain a true and complete copy of all the documents filed and all the evidence adduced in the suit of J. P. Harrison vs. Mrs. Esther Barbara Meyer, widow and executrix, &c., No. 32544 of the docket of this court.

In testimony whereof I hereto sign on this 23d day of February, 1869.
(Signed) M. O. TRACY, *Clerk.*

70 Supreme court of the State of Louisiana.

JILSON P. HARRISON
vs.
ESTHER BARBARA MEYER, WIDOW AND TESTAMENTARY executrix of M. M. Miller, deceased. } No. 2139.

Transcript of appeal filed March 1st, 1869.

Case submitted.—Minutes, Wednesday, November 9, 1870.

The court was duly opened. Present, their honors, James G. Taliaferro, Rufus K. Howell, William W. Howe, associate justices; absent, John T. Ludeling, chief-justice, W. G. Wyly, associate justice.

JILSON P. HARRISON
vs.
ESTHER BARBARA MEYER, WIDOW AND TESTAMENTARY executrix of M. M. Miller, deceased. } No. 2139.

71 This case was called for trial, and the court having heard argument from C. Roselius, esq., of counsel for defendant and appellee, took the same under advisement upon the briefs now on file for both parties.

Opinion of the court.—Filed November 21, 1870.

JILSON P. HARRISON
vs.
ESTHER B. MEYER, TESTAMENTARY EXECUTRIX, &c. } No. 2139.

HOWE, J.:

This action was brought for rent, the last instalment of which is alleged to have fallen due August 8th, 1865. Citation was served December 7th, 1868, and the plea of prescription of three years filed by defendant was therefore correctly maintained by the district judge C. C., 3503.

The property in question was seized by the Government of the United States during the late rebellion, and the tenant, Miller, of whom
72 the defendant is executrix, was made to pay rent to the United States. An action similar to the present was commenced in November, 1865, to compel Miller to pay over again to plaintiff, but was discontinued by plaintiff. The discontinuance was voluntary, and the suit therefore did not have the effect to interrupt the current of prescription. C. C. 3485.

The plaintiff contends that he was compelled to discontinue by military orders, and invokes a modification of the rule contra non valentem, &c. The first of the orders in question was issued in 1864, and merely suspended the progress of suits of a similar character then pending. The second, issued in Sept., 1865, was also general in its scope, and contained nothing which could be held to have compelled the plaintiff to discontinue. It does not appear to have prevented him from beginning his action two months after, in November, 1865, and we find nothing in it which could compel the abandonment of the same.
73 Judgment affirmed.

Judgment.—Minutes, Monday, November 21, 1870.

The court was duly opened. Present, their honors John T. Ludeling, chief-justice, and James G. Taliaferro, Rufus K. Howell, William W. Howe, associate justices; absent, W. G. Wyly, associate justice.

His honor Justice Howe pronounced the judgment and decree of the court in the following case:

JILSON P. HARRISON
vs.
ESTHER BARBARA MEYER, WIDOW AND test'y ex. of M. M. Miller, deceased. } No. 2139.

On appeal from the second district court of New Orleans.

Judgment affirmed.

Rule to shew cause.—Minutes, Monday, January 5, 1874.

The court was duly opened, pursuant to adjournment. Present,
74 their honors James G. Taliaferro, Rufus K. Howell, William G. Wyly, Philip H. Morgan, associate justices; absent, John T. Ludeling, chief-justice.

J. P. HARRISON
vs.
ESTHER B. MEYER, WIFE & TESTAMENTARY executrix of M. M. Miller, deceased. } No. 2139.

On written motion of David C. Labatt, esq., of counsel for plaintiff, it is ordered by the court that Esther Barbara Meyer, wife, &c., defendant herein, and Alfred Philips, one of the counsel of record, and M. O. Tracy, late clerk of the second district court for the parish of Orleans, shew cause on Friday, January the 9th, 1874, at 11 o'clock a. m., why the transcript should not be signed nunc pro tunc by the said M. O. Tracy as clerk of said court.

Motion for service.

75 Supreme court of the State of Louisiana.

CLERK'S OFFICE, *New Orleans, January* 5, 1874.

J. P. HARRISON
vs.
ESTHER B. MEYER, WIFE AND TESTAMENTARY executrix of M. M. Miller, deceased. } No. 2139.

On motion of D. C. Labatt, of counsel for plff., and on suggesting to the court that in this case a final decision was rendered herein on the 21st Nov., 1870, and that he has taken a writ of error to the Supreme Court of the United States, but that he has only lately discovered that the certificate of the clerk of the 2d district court, M. O. Tracy, is unsigned to the transcript on which your honors decided; that the fault is not imputable to plff.; that it was a mere clerical omission, and may and should be corrected, to perfect the record for the appellate court at Washington, it is ordered that Esther Barbara Meyer, wife, &c.,
76 defendant, and Alfred Philips, one of the counsel of record, and M. O. Tracy, late clerk 2d district court parish of Orleans, shew cause on Friday, the 9th day of January, 1874, at 11 o'clock a. m., why the transcript should not be signed nunc pro tunc by the said M. O. Tracy as clerk of said court.

A true copy.

[SEAL.] (Signed) M. P. JULIAN,
Dy. Clerk.

Sheriff's return.—Filed Jany. 9, 1874.

On the 7th day January, 1874, served a copy of the within rule on M. O. Tracy, clerk of 2nd dist. court, in person.

Returned same day.

(Signed) A. RANDOLPH,
Dy. Shff.

Motion for service.

Supreme court of the State of La.

CLERK'S OFFICE, *New Orleans, January* 5, 1874.

J. P. HARRISON
vs.
ESTHER B. MEYER, ETC. } No. 2139.

77 On motion of D. C. Labatt, of counsel for plff., and on suggesting to the court that in this case a final decision was rendered herein on the 21st Nov., 1870, and that he has taken a writ of error to the supreme court of the United States, but that he has only lately discovered that the certificate of the clerk of the 2d district court, M. O. Tracy, is unsigned to the transcript on which your honors decided; that the fault is not imputable to plff.; that it was a mere clerical omission, and may and should be corrected, to perfect the record for the appellate court at Washington, it is ordered that Esther Barbara Meyer, wife, &c., defendant, and Alfred Philips, one of the counsel of record,

and M. O. Tracy, late clerk 2nd district court, parish of Orleans, shew cause on Friday, the 9th day of January, 1874, at 11 o'clock a. m., why the transcript should not be signed nunc pro tunc by the said M.
78 O. Tracy, as clerk of said court.

A true copy.

(Signed) M. P. JULIAN,
Dy. Clk.

Sheriff's return.—Filed Jany. 9, 1874.

Received Jan. 7, 1874, at 3.45 p. m., and returned not served, the said Alfred Phillips refusing to accept service of the same, informing me that he had no further connection with this suit as attorney.

Returned same day.

(Signed) M. McNAMARA,
Dy. Shff

Motion for service.

Supreme court of the State of Louisiana.

CLERK'S OFFICE, *New Orleans, January* 5, 1874.

J. P. HARRISON
vs.
ESTHER B. MEYER, WIFE & TESTAMENTARY executrix of M. M. Miller, deceased. } No. 2139.

On motion of D. C. Labatt, of counsel for plff., and on suggesting to the court that in this case a final decision was rendered herein on the 21st Nov., 1870, and that he has taken a writ of error to the Su-
79 preme Court of the United States, but that he has only lately discovered that the certificate of the clerk of the 2d district court, M. O. Tracy, is unsigned to the transcript on which your honors decided; that the fault is not imputable to plff.; that it was a mere clerical omission, and may and should be corrected, to perfect the record for the appellate court at Washington, it is ordered that Esther Barbara Meyer, wife, &c., defendant, and Alfred Philips, one of the counsel of record, and M. O. Tracy, late clerk 2d district court, parish of Orleans, shew cause on Friday, the 9th day of January, 1874, at 11 o'clock a. m., why the transcript should not be signed nunc pro tunc by the said M. O. Tracy as clerk of said court.

A true copy:

[SEAL.] (Signed) M. P. JULIAN,
Dy. Clerk.

Sheriff's return.—Filed January 9, 1874.

80 Received Jany. 7, 1874, and after diligent search and enquiry the within Esther B. Meyer, wife, &c., could not be found.

Returned January 9th, 1874.

(Signed) FRANK PFISTER,
Dy. Shff.

Rule submitted.—Minutes Friday, January 9, 1874.

The court was duly opened; present, their honors James G. Talia-

ferro, Rufus K. Howell, William G. Wyly, Philip H. Morgan, associate justices; absent, John T. Ludeling, chief justice.

JILSON P. HARRISON
vs.
ESTHER BARBARA MEYER, WIDOW AND TESTAMENTARY EXECUTRIX OF M. M. MILLER, DECEASED. } No. 2139.

This case was called for trial on the rule directing defendants to shew cause why the certificate of the clerk attached to the tran-
81 script of appeal should not be signed nunc pro tunc as prayed for by the plaintiff. And having heard argument from David C. Labatt, esq., of counsel for plaintiff in rule,

The court took the matter under advisement upon the papers now on file.

Opinion of the court.—Filed January 19, 1874.

J. P. HARRISON
vs.
E. B. MEYER, WIDOW & TESTY. EX. } No. 2139.

HOWELL, J.:

After judgment was rendered on the appeal herein and writ of error was obtained from the Supreme Court of the United States, counsel for plaintiff in suit and in error discovered that the certificate of the clerk of the lower court appended to the record was unsigned, whereupon he took a rule on the defendant, her counsel of record, and the said
82 clerk, now not in office.

The defendant could not be found; her counsel of record refused to accept service of the rule, stating he had no further connection with the suit as attorney; the ex-clerk was served but has made no answer.

We can see no good reason why the certificate should not be signed as desired. Both parties submitted the record, without the sig'ature, to this court, without any objection, and neither party should now be disposed or allowed to take advantage of the clearly accidental omission.

It is therefore ordered that the rule be made absolute.

Judgment.—Minutes Monday, January 19, 1874.

The court was duly opened, pur'uant to adjournment. Present,
83 their honors John T. Ludeling, chief justice, and James G. Taliaferro, Rufus K. Howell, Philip H. Morgan, associate justices; absent, William G. Wyly, associate justice.

His honor, Justice Howell, pronounced the judgment and decree of the court in the following case:

JILSON P. HARRISON
vs.
ESTHER BARBARA MEYER, WIDOW & TESTY. EX., &c. } No. 2139.

(Rule to shew cause, &c.)

It is ordered that the rule be made absolute.

Clerk's certificate.

UNITED STATES OF AMERICA,
State of Louisiana:

Supreme court of the State of Louisiana.

I, John Miller Howell, clerk of the supreme court of the State of
84 Louisiana, holding sessions at the city of New Orleans, do hereby certify that the above and foregoing eighty-three (83) pages contain a full, true, and complete transcript of the proceedings had in the second district court of New Orleans in a certain suit wherein Jilson P. Harrison was plaintiff and Esther Barbara Meyer, widow and testamentary executrix of M. M. Miller, deceased, was defendant, and also of all the proceedings had in this supreme court on the appeal taken by said plaintiff, which appeal is now on the files thereof under No. 2139.

In testimony whereof I have hereunto set my hand and affixed the seal of this honorable court, at the city of New Orleans, this fifth (5th) day of March, anno Domini one thousand eight hundred and seventy-four, and in the ninety-eighth year of the Independence of the United States of America.

[SEAL.] JNO. M. HOWELL,
Clrk. S. C.

85 STATE OF LOUISIANA.

Sixth district court for the parish of Orleans.

J. P. HARRISON *vs.* M. MILLER. } No. 17265.

FRIDAY, *the 9th day of February*, 1866.

Present, the honorable Guy Duplanties, judge.

On motion of Harrison & Hunton, attorneys for the plaintiff herein, it is ordered that this cause be discontinued at plaintiff's costs.

A true copy:

[SEAL.] S. O'LEARY,
Deputy Clerk.

(Extract from the minutes.)

(Indorsed:) No. 17265. Sixth district court. J. P. Harrison vs. M. M. Miller. Copy of discontinuance.

86 From the supreme court of Louisiana.

J. P. HARRISON, PLTFF. & APPELLANT, *vs.* ESTHER BARBARA MEYER, WIDOW, & T. EX. M. M. Miller, deceased.

To the honorable Joseph P. Bradley, one of the justices of the Supreme Court of the United States.

The petition of Jilson P. Harrison, a resident of New Orleans, & citizen of Louisiana, respectfully shows:

That in the suit above styled, No. 32544 of the docket of the 2d dis-

trict court of New Orleans, & No. 2139 of the supreme court of Louisiana, a final decree was rendered by said supreme court, in last resort, being the highest court in said State in which a decision therein could be had, against your pet'r, on the 21st Nov., 1870, by which pet'r is deprived of his right to recover & receive from def't the sum of eight thousand one hundred & three $\frac{20}{100}$ dollars, with 5% interest from 1st Oct., 1868, until paid, & costs. That in said suit pet'r specially set up, plead, & relied on the validity of & claimed the protection & exception of certain military order or orders, emanating from the paramount Federal authority, then in military possession of this territory during the late rebellion, against the plea of prescription or limitation set up by def't &

87 the final decision aforesaid, in which said military orders were fully & specially plead, & the rights of your pet'r distinctly raised, all which are apparent on the face of the record, was against your pet'r, & specially against the right, privilege, exemption, & immunity conferred upon pet'r by law, & so set up thereunder & against the validity of said military orders, as well as against the authority exercised by said military orders under the United States. That your pet'r is by said judgment irreparably injured & aggrieved, & he is advised & believes there is manifest error of law therein to his prejudice, unless he can be relieved therefrom by writ of error to the Supreme Court of the United States. Pet'r further alleges that said judgment is violative of & repugnant to the laws & Constitution of the United States, & its authority, & contravenes military orders from paramount authority, in force & exercised under the United States, in & over the city of New Orleans & its inhabitants & your pet'r & def't, during its occupation by the Federal Army, & which were duly & fully set up, & by which pet'r was protected against the plea of prescription, sustained by said decree, & is destructive of the rights secured to pet'r by the acts of Congress, the

88 Constitution & laws of the United States, & violated the military orders aforesaid.

That your pet'r desires to have said judgment revised, reviewed, & corrected by the Supreme Court of the United States by writ of error, on complying with the requisites & conditions & stipulations of law in such cases made & provided, & giving bond as the court may order & to its satisfaction.

Pet'r alleges that he duly presented a petition therefore to the Hon. J. J. Ludeling, chief-justice of the supreme court, for said writ, & he has refused to grant it;

Wherefore, pet'r prays the court to grant him a writ of error, returnable to the Supreme Court of the United States, at Washington, D. C., at its next term, to wit, Oct., 1874, on the 2d Monday thereof, on his giving bond according to law, & as the court may direct, & that due & proper notices, citations, & service be made thereof on the def't or the counsel of record, according to law, & for all general & equitable relief & further order as to the court may seem meet & proper.

LABATT, ARONI & CLINTON,
C. for Pet'r.
D. C. LABATT, *Atty.*

89 *Order.*

A writ of error is allowed hereby in this case as prayed for & according to law, returnable to the Supreme Court of the United States on the 2d Monday of Oct., 1874, at Washington, D. C., upon pet'r giving bond in

the sum of three hundred dollars, with good & solvent surety conditioned as the law directs.

(Indorsed:) Petition granted and writ of error allowed.

JOS. P. BRADLEY,
Associate Justice of Sup. Ct. U. S.

Filed Dec. 31st, 1873.

M. P. JULIAN,
Dy. Clk.

90 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States to the honorable the judges of the supreme court of the State of Louisiana, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Louisiana before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Jilson P. Harrison and Esther P. Meyer, widow and testamentary extx. of M. M. Miller, dec'd, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the de-

91 cision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Jilson P. Harrison, as by his complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and custom of the United States should be done.

Witness the honorable Nathan Clifford, senior associate justice of the said Supreme Court, the twenty-second day of December, in the year of our Lord one thousand eight hundred and seventy-three.

Issued 22d December, 1873.

D. W. MIDDLETON,
Clerk of the Supreme Court of the United States.

Allowed by—

JOSEPH P. BRADLEY,
Associate Justice of the Supreme Court U. S.

92 The United States of America to Esther B. Meyer, widow and testamentary extx. of M. M. Miller, decd., greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error, filed in the clerk's office of the supreme court of the State of Louisiana, wherein Jilson P. Harrison is plaintiff in error, and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Joseph P. Bradley, associate justice of the Supreme Court of the United States, the twenty-second day of December, in the year of our Lord one thousand eight hundred and seventy-three.

JOSEPH P. BRADLEY,
Asso. Just. Sup. Ct. U. S.

93 (Indorsed:) No. 2139. Sup. court of the State of Louisiana. J. P. Harrison, plff. in error, vs. Esther B. Meyer, wife, &c., deft. in error.

Recd. Dec. 30th, '73, by the U. S. marshal, and on the 2nd day of January, 1874, served a copy hereof on Esther B. Meyer, widow and testamentary executrix of M. M. Miller, deceased, by handing the same to her in person in this city.

New Orleans, Jany. 5th, 1874.

S. W. REED,
Dy. U. S. Marshal.

Filed Febry. 24th, 1874.

M. P. JULIAN,
Dy. Clk.

On this fifth day of January, in the year of our Lord one thousand eight hundred and seventy-four, personally appeared before me, the subscriber, S. W. Reed, a deputy U. S. marshal for the district of Louisiana, and makes oath that he delivered a true copy of the within citation to Esther B. Meyer, widow & testamentary executrix of M. M. Miller, deceased, as stated in his official return hereon.

S. W. REED.

Sworn to and subscribed the 5th day of January, A. D. 1874.

[SEAL.] F. B. VINOT,
U. S. Commr.

94 Circuit court of the United States for the circuit & district of Louisiana.

J. P. HARRISON
vs.
ESTHER BARBARA MEYER, WIDOW & TESTAMENTARY EX'X of M. M. Miller, dece'd. } In error.

Know all men by these presents, that we, Jilson P. Harrison, of New Orleans, and H. M. Payne, are held and firmly bound unto the above-named Esther Barbara Meyer, widow and testamentary executrix of M. M. Miller, dec'ed, in the sum of three hundred dollars, ($300,) lawful money of the United States, to be paid to the said Esther Barbara Meyer, widow & testamentary executrix of M. M. Miller, dec'd; to

which payment, well & truly to be made, we bind ourselves & each of us, jointly & severally, *of* our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seal,
95 and dated New Orleans, Dec., 1873, at New Orleans, State of Louisiana.

Whereas the above-named Jilson P. Harrison hath prosecuted a writ of error to the Supreme Court of the United States for the circuit and district of Louisiana, to reverse the judgment rendered in the above-entitled suit by the supreme court of Louisiana:

Now, therefore, the condition of this obligation is such, that if the above-named Jilson P. Harrison shall prosecute his said writ of error to effect, & answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force & effect.

[L. S.] J. P. HARRISON.
[L. S.] H. M. PAYNE.

Sealed & delivered in presence of—

Personally appeared H. M. Payne, who, being duly sworn, says
96 he is the surety in the above bond, & that after the *the* payment of all his debts he is good & well worth the sum of three hundred dollars over & above his liabilities.

H. M. PAYNE.

Sworn & subscribed before me this 13th day of December, 1873.

W. T. EVANS,
Second Justice Peace, Parish of Orleans, La.

(Indorsed:) Bond in J. P. Harrison vs. Esther B. Meyer, wife & t. ex. M. M. Miller, dec'd.

Bond approved.

J. P. BRADLEY,
Associate Justice of Sup. Ct. U. S.

Filed Dec. 31st, 1873.

M. P. JULIAN,
Dy. Clk.

(Indorsement on cover:) No. 174. Jilson P. Harrison, plaintiff in error, vs. Esther B. Meyer, widow & testamentary extx. of M. M. Miller, dec'd. Louisiana sup. court. Filed 9th May, 1874.

In the Supreme Court.

OF THE UNITED STATES.

ERROR TO THE SUPREME COURT OF LA.

J. P. HARRISON, PLAINTIFF IN WRIT OF ERROR,

versus

ESTHER BARBARA MEYER, WIDOW AND TEST. EX. OF M. M. MILLER, DEC'D., APPELLEE.

Brief of Plaintiff and Appellant.

DAVID C. LABATT,
Attorney for Plaintiff in Error.

A. W. Hyatt, print, 38 Camp st., N. O.

In the Supreme Court

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ESTHER BARBARA MEYER, WIDOW AND TEST. EX. OF M. M. MILLER, DEC'D., APPELLEE.

Brief of Plaintiff and Appellant.

This is a writ of error, from a final decision of the Supreme Court of Louisiana, rendered as follows :

This action was brought for rent, the last instalment of which is alleged to have fallen due August 8th, 1865. Citation was served December 7th, 1868, and the plea of prescription of three years, filed by defendant, was

therefore correctly maintained by the District Judge. C. C. 3503.

The property in question was seized by the government of the United States during the late rebellion, and the tenant Miller, of whom the defendant is executrix, was made to pay rent to the United States. An action similar to the present was commenced in November, 1865, to compel Miller to pay over again to plaintiff, but was discontinued by plaintiff. The discontinuance was voluntary, and the suit therefore did not have the effect to interrupt the current of prescription. C. C. 3485.

The plaintiff contends that he was compelled to discontinue by military orders, and invokes a modification of the rule, *contra non valentem*, etc.

The first of the orders in question was issued in 1864, and merely suspended the progress of suits of a similar character then pending. The second, issued in September, 1865, was also general in its scope and contained nothing which could be held to have compelled the plaintiff to discontinue. It does not appear to have prevented him from beginning his action two months after, in November, 1865, and we find nothing in it which could compel the abandonment of the same.

THE FACTS

are as follows:

J. P. Harrison leased certain premises to M. M. Miller for the term of five years, commencing on 1st October, 1859, for which Miller stipulated to pay $2000 a year, or $166 66 monthly. The lease is on p. 41, Transcript.

This suit is to recover so much as was due thereon, amounting to $8,193 25, as per account filed with the petition. See Transcript, p. 9.

The petition charges that Miller took possession on the 1st October, 1859, by virtue of a lease (p. 30) as plaintiff's tenant, and as such occupied the premises until 8th August, 1865. Miller paid the rent to plaintff up to 1st May, 1862, and then ceased to pay although he continued in possession. Plaintiff claims rent with interest from 1st May, 1862, to 8th August, 1865, as per said account.

The petition also charges that plaintiff, on the — day of November, 1865, brought suit against said Miller in the Sixth District Court of New Orleans, on the same stipulations and for the purpose of recovering a judgment against him for the rents now sued for, and *that the said Miller appeared therein and pleaded* that the prosecution of that suit was in violation of a military order, or orders, then in force in the Department of the Gulf, of which the State of Louisiana was then *a part, and prayed that the suit be dismissed.*

The petition also further charges that there was a military order, or orders, in force in the State of Louisiana prohibiting the prosecution of said suit, as set forth in said plea, and that as defendant Miller claimed the protection of said military orders against the further prosecution of that suit, he, the plaintiff, was compelled to dismiss the same, and was unable further to prosecute his rights in said suit, and that the courts of the parish

of Orleans, within which the said Miller resided, were closed, and ousted of jurisdiction by military order against the prosecution of his said rights by suit, so long as the State of Louisiana was under military government. To this petition defendant appeared and plead .

First—A general denial.

Second—That plaintiff, having left the city of New Orleans and abandoned his property in May, 1862, and gone into the Confederacy, the premises were taken possession of by the United States authorities and her late husband was ejected, as tenant of plaintiff, from the premises and compelled to pay rent to the government, through its proper officers, during the whole period for which the rent of said premises has not been punctually paid to plaintiff, as per lease and vouchers from 1 to 25 inclusive. And

Third—The prescription of three years.

ARGUMENT.

As the defendant does not deny the execution by Miller of the lease sued on, and as the proof shows that he went into possession of the premises by virtue thereof, as plaintiff's tenant, it follows that plaintiff is entitled to a judgment, unless defendant shows some *legal and valid discharge from Miller's obligation to pay according to the* stipulations, or that the "prescription of three years" protects her.

The defendant admits in her second plea that Miller

went into possession as plaintiff's tenant, by the charge therein, "*that her late husband was ejected as tenant of plaintiff.*" He could not have been ejected therefrom as plaintiff's tenant, if he had not been then in possession as plaintiff's tenant.

Miller also, in a subsequent lease from plaintiff to him of the same premises, virtually admits the same thing. This new lease, at p. 43, dated 27th October, 1865, provides: "It is further agreed and understood that the above lease for one year shall in *no wise* prejudice the claim which said Harrison has against said Miller for back rents *due and unpaid* in virtue of a former lease, under which said Miller used and occupied said premises and for which unpaid back rents suit is now being instituted in the Sixth District Court of New Orleans by said Harrison against said Miller.

Miller accepted the new lease subject to said conditions, etc. Meyer proves that Miller occupied the premises as plaintiff's tenant. *This new lease contains a clear admission of plaintiff's claim for "back rents due and unpaid" in August*, 1865, and refers to the suit afterwards brought on the 8th November, 1865, in the Sixth District Court, No. 17,265. (See admission, Trans. p. 52.) The discontinuance of this suit was on February 9th, 1866, and if it be shown not to have been voluntary, must interrupt the prescription and plaintiff is entitled to recover.

It is agreed at Trans. p. 26 that plaintiff may use the record of Harrison vs. Miller, No. 17,265 of the docket

of the Sixth District Court of New Orleans. Under this reservation the date of the discontinuance is important. It is 9th February, 1866, as appears by the certified copy annexed to the transcript. (See last page.) Prescription then only began to run from the date of this discontinuance and at the time of the service of citation, December 7th, 1868, in this suit, three years even, in the absence of military orders, had not elapsed. But if the military orders Nos. 31 and 38 closed the courts to plaintiff while they were in force, and access to them was denied by paramount authority, we contend that under the decisions of this court prescription was suspended altogether, until military force was removed.

It is a matter of public history that Louisiana was not legally reconstructed until the year 1868, but there can be no doubt that military rule existed here certainly up to Jan. or February, 1866, and by the decisions of this court until August, 1866. Therefore the military order No. 38 was in force in January, 1866. That order is dated September 8th, 1865. It was in force when it was plead by Miller after issue joined in November or December, 1865, and he claimed and received its protection and enforcement against plaintiff. That order reads as follows, (p. 44 Trans.):

HEADQUARTERS DEPARTMENT OF THE GULF,
New Orleans, Sept. 8, 1865.

General Orders No. 38.]

The commanding general understands that persons whose property has been seized as confiscable or aban-

doned and who have had it restored through the clemency of the government, have threatened to the tenants and lessees of the Treasury Department with vexatious suits to recover rents for the terms for which it had been held by such tenants or lessees and have endeavored to harass or coerce them into compromising these unfounded and unlawful demands.

The tenants of the government are warned that the rents for the terms during which they held under lease or demise from the Treasury or other departments are due to the government alone, and no plea or excuse of a payment to a third party will be accepted or entertained, but the lawful rights of the general government will be rigidly enforced and its tenants protected.

By order of

GENERAL CANBY.

General Orders No. 31. N. O., March 2nd, 1864. Transcript p. 30. "All suits and other legal proceedings in the State courts of Louisiana against the lessees of property from the Government of the United States, real or personal, for possession, occupation, *rent*, or trespass, are hereby suspended until further orders. Any persons who may have claims against such lessees or who are aggrieved by such occupation, will present their claims to the provost marshal of the Department."

By command.

MAJOR GENERAL BANKS.

If these orders suspended process, and ousted the

courts of juridiction, their doors were closed to litigants like the plaintiff and *a fortiori*. prescription was also suspended. If this power existed and these orders were in force January 1866, of which there is no doubt, then prescription had not accrued till January 1869, and, it is shown, suit was brought and citation served December 7th, 1868, in ample time to interrupt its completion. But it is argued in the opinion, that there was a voluntary discontinuance of his suit brought in November, 1865, and this fact prevents the interruption of prescription, as laid down in the Code, art. 3503. Under ordinary circumstances we admit this would be so, but *inter arma leges silent*. This article of the Code was not in force, when plaintiff, in obedience to military orders, did what he might have been obliged to do by bayonet law. It was involuntary and clearly the result of the sword of Damoclès, held over him by his recalcitrant lessee. His entry into the court house, with such a suit, was a violation of military will and a contempt of superior authority, and when his attention was drawn to the extraordinary provisions of the order, he found himself threatened with court marshals and liable to be sent to Ship Island. Such a discontinuance is not voluntary in the sense or spirit of the article quoted by the Supreme Court of Louisiana. It is a quibble to say so, in our humble opinion, even if that article were not equally suspended in the "midst of arms". The question is, was the prior suit without effect, because of its having been discontinued by plaintiff? in other words, was its discontinuance voluntary?

The prior suit, we have seen, was brought in violation and doubtless in ignorance of these military orders, then in force in this department. Defendant so charged the law and facts to be, and plaintiff admits the truth of that charge. These military orders were, during the military government, the *supreme law* in this department and as such obligatory on individuals and courts, so far as obedience is concerned. In the prior suit, Miller plead these orders, as a bar to the further prosecution of that suit and asked its dismissal.

As Miller brought these orders directly to the attention of the court and the plaintiff, plaintiff was necessarily compelled at once to *obey* or *disobey* them. There was no other alternative; obedience involved and compelled a discontinuance of his suit, disobedience would have been a military offence and besides would have been a *vain* thing, for the court might have dismissed it for want of jurisdiction. The discontinuance, therefore, was not voluntary, but was, in consequence of a *law*, incumbent on plaintiff to obey promptly. Will this court hold that the rights of plaintiff were prejudiced and destroyed by such a discontinuance and say it was voluntary, when there was a *force majeure*, requiring him to discontinue and retrace his steps, taken to preserve his rights? Or, will this court hold that, while plaintiff was prohibited from preserving his rights and prosecuting them, freely and without fear, as belongs to every American, it will, at the same time, permit prescription to run against a party thus under *duress?* Prescription

is favored in the law when the *laches* of creditors permit its acquisition, but the spirit of its morality and legality depends entirely upon the corresponding corollary of freedom of action by the creditor to preserve his rights. If you deny the action to the one, you incidentally and of course destroy the right of the other to acquire limitations. Analogous to this principle of perfect equity, this court has recently held, in 17th Wall.. Lasere's case, that when a defendant is prohibited by public law from reaching the jurisdiction personally, it is an idle formality to cite him and all the proceedings are *coram non judice* and void. When the courts are closed *to* him, necessarily they must be closed *against* him. Where the law denies his right of action, it necessarily suspends the running of prescription to destroy that right, so long as the prohibition lasts.

In Adger vs. Alston, 15 Wall. 560, this court settled the termination of the war in Louisiana and the United States at the date of 20th August, 1866. Plaintiff then was in time up to 20th August, 1869, and he served his citation December 7, 1868, within the period of prescription. The point in this case seems directly adjudicated in 11 Wall., p. 252. Your Honors said: "This court is of opinion that the decision of the cause must turn upon the defence, which is 'that in computing the five years since the cause of action accrued, the period during which the courts of the State where the defendant resided, were closed in consequence of the late civil war, must be deducted. Regulations exist in some of the States, that

where a first suit is abated and a second suit is brought within a prescribed time, the statute of limitation shall cease to run from the date of the first suit, but the court is not referred to any such enactment as applicable in this case, and it is believed that none such exists, as the Code of the State provides that if the plaintiff, after having made his demand, abandons or discontinues it, the interruption shall be considered as having never happened. O. Code 3485. Grant all that, still the question remains to be considered whether the alleged prescription was not interrupted by the fact that the courts of the State where defendant resided were closed by the late civil war for such a period of time that the bar was not complete when the present suit was commenced." On the 20th August, 1866, "peace, order and tranquility were fully restored in all the States." 9 Wallace 70; 14 St. at Large; 2 Wall. 258.

"Throughout the entire period between the dates of those proclamations, the courts of the State were closed to the plaintiff's, and they were totally incapable of instituting any suit for the enforcement of their claim." 1st Rob. 200; Wheaton's Law Nations, by Lawrence, pp. 544, 877; 4 Ellis and B. 963; 16 John, 438. *Quoad*, the class of cases like plaintiff's, military orders quoted effectually closed the courts to him, and although in fact, the clerk, to make his fees, took the suit, and issued process, the court was "*coram non judice*" for all the practical purposes of enforcing his right *abinitio*. Technically considered, the "voluntary abandoment" of a suit,

mentioned in the Code, presupposes a suit properly brought in a court capable of ultimate process and not an abandonment of a suit, which never should or could have been brought. It implies the abandonment of a right, and as no right existed, it does not come within the spirit or words of the law. The Supreme Court of Louisiana has based its decree upon what seems a mere mockery of justice, when its reasoning says that plaintiff "voluntarily abandoned" his cause of action under the circumstances detailed in the record, with military bayonets pointed at his breast. As well might the highwayman plead that the unwary traveler had "voluntarily abandoned" possession of the property of which he has been robbed by the words "stand and deliver," with a revolver pressed against his head. See Hanger vs. Abbott, 6 Wall. 532.

"Neither laches nor fraud can be imputed to the creditor in such a case, as the inability to sue becomes absolute by the declaration of war wholly irrespective of his consent or opposition. When the contract was made he was competent to sue, but the effect of war is to suspend his right during its continuance, not only without any fault on the part of the creditor, but under circumstances which made it his duty to abstain from any such attempt. His remedy, as was said in that case, is suspended by the two governments and by the law of nations, not applicable at the date of the contract, and which comes into operation in consequence of an event over which he has no control." 9 Wall. 689. "Creditors

debts due from belligerents are suspended during war, but the debts are not annulled. They are precluded during war from suing to recover their dues, but with the return of peace we return the right and the remedy. Where a debt has not been confiscated during war the rule is now universally acknowledged that the right to sue revives when peace is restored, and the rule is that the restoration of peace returns to the creditor both the remedy and the right, which necessarily implies that the law of limitation was suspended during the same period." In 10 Wall. 223, your Honors said of decisions on the statutes of limitations: "They all rest on the ground that the creditor has been disabled to sue by a superior power, without any default of his own, and therefore that none of the reasons which induced the enactment of the statutes apply to his case; that unless the statutes cease to run during the continuance of the supervening disability he is deprived of a portion of the time within which the law contemplated he might sue."

Again, in 15th Wall, p. 184, this court aptly held that, "Statutes of limitation, in fixing a period within which rights of action must be asserted, proceed upon the principle that the courts of the country, where the person to be prosecuted resides, or the property to be reached is situated, are open during the prescribed period to the suitor. The principle of public law, which closes the courts of a country to a public enemy during war, renders compliance by him with such a statute impossible, as is well said in the recent case of Semmes vs. Hartford

Insurance Company. 13 Wall, 160. "The law imposes the limitation, and the law imposes the disability. It is nothing, therefore, but a necessary legal logic that the one period should be taken from the other." In Hoare vs. Allen, 2 Dallas 102, it was said : "When a person is prevented by law from paying the principal, he shall not be compelled to pay interest during the prohibition." Parties ought not to suffer for their moral conduct and their submission to the laws. Foxcraft vs. Nagle, in 1791.

We contend that these authorities clearly establish :

First—That prescription did not and could not apply, and that the Supreme Court of Louisiana have refused to protect plaintiff's right, preserved to him by the prohibition of a military order of paramount authority, to pursue his suit, and the decision therefore presents a Federal question within the jurisdiction of this court.

Second—The decision is directly adverse to the protection claimed under military orders, emanating from the government of the United States, apparent upon the face of the record, and relied upon and set up by the plaintiff in error.

It is therefore submitted that the decree should be reversed and judgment entered up for the plaintiff and appellant for the full amount claimed. Even if this court be of opinion that the actual payments to the government are valid, they can only be so *protanto*; but because one-half or one-fourth is taken by force will the law therefore take away the residue? Should this court re-

ject the payments relied upon, the account on file is the correct amount due. Should the court treat these payments as valid credits *protanto*, an account will be filed showing the balance due in that event. There is neither charge nor proof that plaintiff had been engaged in the rebellion or had abandoned his property, or had committed any act which subjected his property to forfeiture or confiscation. Ours is a limited government, and among the limitations is the fundamental one that no man shall be deprived of life, liberty or property except upon due process of law.

There is something said by respondent about a pardon to plaintiff, but no proof thereof is to be found in the Transcript. The maxim "*de non apparentibus*" applies, and plaintiff stands before this court clearly entitled to a reversal of the decree which is thus shown to be palpably erroneous.

Respectfully submitted.

DAVID C. LABATT,
Attorney for Plaintiff in Error.

United States Supreme Court.

October Term, 1875.

JILSON P. HARRISON, PLAINTIFF IN ERROR,
vs.
M. M. MILLER'S EX'R, &c. } *No.* 174.

Defendant's Brief.

The facts of this case are clear, and beyond dispute. They give rise to four questions of law:

FIRST. Has this court jurisdiction?

SECOND. Is it a good defence to an action of rent to show that the landlord failed to secure the enjoyment of the property to the tenant?

THIRD. If tenant be evicted by *vis major*, is he bound under Louisiana law for the payment of rent?

FOURTH. Do the military orders protect the plaintiff from the plea of prescription filed by defendant?

ARGUMENT.

The rent claimed here is from May 1, 1862, to August 8, 1865, during all which time Louisiana partly, and New Orleans wholly, were in the military occupation of the National forces under Generals Butler, Banks, and Canby,

and the laws of war prevailed. Harrison, the plaintiff, left the State. The *locus in quo* was seized and held by the United States authorities under the Abandoned Property act. The Government evicted Harrison, and made Miller *attorn* by force to it. Miller was certainly not bound to test the sincerity of the United States army *vi aperta;* and he relies on these facts, that is, the *authority of the Government* to absolve him from the payment of rent.

The essence of a contract of lease on the part of the lessor is, *inter alia*, "to cause the lessee to be in a peacea- "ble possession of the thing during the continuance of the "lease."

La. Code 1870, article 2692.

Article 2696. "If the lessee be evicted, the lessor is "liable for the damage and loss which he sustained by "the interruption of the lease."

The courts of Louisiana could not regard the United States as a naked trespasser without authority for its acts.

This defence seems perfect against the entire claim of the plaintiff. (See also La. Code, 2697, 2743.) The house was sequestered to help support the war, and this was a clear case of *vis major*.

These remarks dispose of the second and third questions.

On the fourth point, the first military order, March 2, 1864, *suspends* all suits against the lessees of property from the Government, and any persons aggrieved * * will present their claims to the provost-marshal. * * *

Record, p. 12.

It was in the very teeth of this order that the previous suit, which was afterward discontinued voluntarily, was begun, (Nov., 1865.)

See Petition, Rec., p. 2; Admissions, Rec., p. 19.

The military order of Sept. 8, 1865, (Record, p. 17,) was likewise anterior to the institution of the first suit. It is in direct antagonism with plaintiff's pretensions. It declares plaintiff's claim "unfounded and unlawful."

Plaintiff admits that if his discontinuance of the first suit was voluntary his claim is prescribed. (La. Code, 1870. article 3519; Dennistoun *vs.* Rist, 9 La. Annual, 464.) The order of discontinuance is exactly equivalent to a voluntary non-suit under the common law. See the averments of the petition, that his rights of action were merely "*suspended*" by the military orders.

Admit, *a. g.*, that the acts of the Government and the orders of its military induced or persuaded or compelled the plaintiff to discontinue his suit, it is still a voluntary act on his part, and not in any manner brought about by the defendant. On principle, the act of the Government in inducing or persuading or compelling the plaintiff to discontinue would be in law precisely equipollent to the act of persuasion or compulsion by any other person, natural or juridical. It might give rise to an action for damages against the wrong-doer, but could not affect in the remotest degree the legal current of prescription. The discontinuance of the suit was a judicial act. It was likewise a judicial admission that plaintiff's claim against the defendant was unjust and ill-founded, and it was a renunciation of the right to proceed at law under the summons to appear and answer.

But we may go a step farther. Had the military order compelled the plaintiff to discontinue, still the current of prescription would not be interrupted by the suit. For this order was an act of the Executive Department of the Government, the validity of which cannot be brought into question collaterally, *if at all*, by the Judiciary Department. The military order in this case provided: "Any

" persons who may have claims against such lessees, or " who are aggrieved by such occupation, will present their " claims to the provost-marshal of the department." (Rec., p. 12.) It was in strict accordance with the provisions of the original and amended acts of Congress relative to captured and abandoned property (12 S. L., 820; 13 S. L., 375) that the Executive Department took possession of the premises leased by plaintiff to defendant and *sequestered the rents*. The United States is the trustee for the plaintiff; the rents collected are in law still in the Treasury of the United States, and the Court of Claims alone would have jurisdiction if it were not for act of February 9, 1867. (14 S. L., 397.) It is quite clear that, as against the defendant, no cause of action for rent existed in the plaintiff during the entire period in which the sequestration was operated by the United States authorities; and on a general demurrer to defendant's plea this suit must have been dismissed; and this is the actual relief which defendant asks.

Record, p. 3, Mrs. Alexander's Cotton, 2 Wall., 413.

It is true the judge *â quo* puts his decision both upon the *vis major* and prescription; the supreme court of Louisiana upon the plea of prescription alone.

But, have your Honors jurisdiction? If you have, it must be by virtue of some provision of R. S., 709. In fact, the case is one in which the defendant avails himself " of an authority exercised under the United States," and the decision is not *against*, but *in favor of its validity*, which is the exact contradictory of the case giving the jurisdiction.

If the defendant be protected from suit for the rent claimed under and by virtue of the statutes of the United States, and the court below gives effect to the statutes, there

is no jurisdiction here, unless simply to affirm the judgment.

This simple statement of the case is, however, not recognized by plaintiff. His position is: "Against the defend- "ant I had a good cause of action, which, *by military* "*order*, I was forced to abstain from enforcing. This "military order protected me from the plea of prescrip- "tion, and was an authority exercised under the United "States. The decision here is against the validity of these "military orders, as protecting me from the plea of pre- "scription; therefore my right is to have the judgment "re-examined." The facts do not sustain this position, even if it be true in law, for there is no military order in the record compelling the discontinuance. Even if there were, we have shown it would not affect in any way the current of prescription. From a military order to a plaintiff to discontinue a suit no judicial effect can flow but that resulting from a voluntary discontinuance. When the plaintiff goes into court and moves a discontinuance, the court will not stop to inquire what are the influences behind the suitor. Under any and all circumstances, in the eye of the law, the motion to discontinue must be the *voluntary* act of the party.

Here the discontinuance was as clearly voluntary as the payment of taxes in Hamilton *vs.* Dillon, (21 Wall., 92,) and under the same law virtually.

13 S. L., 375.

Suppose, when plaintiff discontinued his first suit, he had made the following motion to the court: "A military "order commands me to discontinue this suit; it is en- "tirely against my will; I don't want to do it, but I can- "not resist bayonets; thus compelled, fearful of conse- "quences if I omit to discontinue, I move the court to

" dismiss this suit, with the reservation of all my legal " rights," what would the Louisiana judge have replied to him?

See Martin, J., in Johnson *vs.* Duncan, 3 Martin, 531.

Let us admit, *a. g.*, that the force brought to bear upon plaintiff by a military order led him to discontinue. The order of discontinuance rendered by the court was a FINAL JUDGMENT in the case. (La. Code of Practice of 1870, articles 491, 492, 539.) It cannot be revived by a rule to show cause; and if such revival be allowed, any subsequent judgment will be void.

Gilbert *vs.* Nephler, 15 La., p. 60.

It would be contrary to all principle to permit such a judgment to be attacked *collaterally.*

C. P., art. 556.
See also Parker *vs.* Anderson, 5 Monroe, 450.

But we do not see how your Honors can reach the question of prescription through the military orders under R. S., 709. Under the pleadings the plaintiff was decreed without any cause of action, and the defendant protected from suit by the statutes of the United States. If plaintiff never had any cause of action against defendant, the question of prescription could not possibly arise.

We pray your Honors to affirm the judgment.

DURANT & HORNOR,
for Defendant in Error.

WASHINGTON, D. C., *August* 24, 1875.